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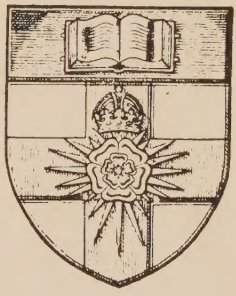

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The Right Hon. Samuel Walker.
The Right Hon. Hugh Holmes.

King's Bench Division.

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CORRIGENDA.

Page 179, line 1, *for* "has" *read* "was."

,, ,, line 17, *for* "him in" *read* "his."

,, 196, line 3 from foot, *for* "1887" *read* "1867."

,, 562, line 13, *after* "repair," insert colon instead of full stop.

,, ,, line 14, *after* (3), insert full stop instead of comma.

,, 595, line 14 from foot, *for* "*Burnly*" *read* "*Burnby*."

CASES

DETERMINED BY

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1902.

REX (COLEMAN) *v.* PETTIT (1).

K. B. Div.
1901.

May 1–4, 13.

Fisheries (*Ireland*) *Acts—Steam Trawling* (*Ireland*) *Act*, 1889—52 & 53 *Vict.* c. 74—*Bye-law*—Ultra vires—*Territorial waters.*

The Inspectors of Irish Fisheries, in pursuance of the Steam Trawling (Ireland) Act, 1889 (52 & 53 Vict. c. 74), s. 3, made a bye-law (duly approved of) prohibiting steam-trawling within an area, defined by them, which extended more than three miles seaward of low water-mark. The defendant was convicted under this bye-law for illegally fishing with an "otter-trawl" at a point some five miles distant from the coast:—

Held (Gibson, J., *diss.*), that the bye-law was *intra vires*, and binding, at least, upon all subjects of the British Crown.

Quære, Whether the bye-law in question was valid in the case of foreigners?

CASE STATED, pursuant to 20 & 21 Vict. c. 43, by the Justices of county Waterford, sitting at Dungarvan Petty Sessions on the 2nd March, 1901, upon the hearing of a complaint

(1) Before Lord O'Brien, L.C.J., and Andrews, Gibson, and Boyd, JJ.

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at the prosecution of T. Coleman, a coastguard officer, against the appellant (David Pettit, of Milford Haven, Wales, mariner(1)), for that he "on the 9th of February, 1901, off the coast of the county of Waterford within the prohibited area, did unlawfully use from a steamer the method of fishing known as otter-trawling, contrary to the provisions of the statute in that behalf made and provided."

The parties being represented by their solicitors and the charge heard, the Justices, by a majority, ordered the defendant "to pay for fine the sum of £5, and for costs the sum of £10 12*s.*, and in default of payment" distress and imprisonment; and, at the defendant's request, they stated the following case:—

"1. On behalf of the plaintiff a bye-law was produced in evidence, which bye-law was made, on the 10th July, 1897, by the Inspectors of Irish Fisheries, and approved by the Lord Lieutenant and Privy Council in Ireland on the 4th November, 1897.

"2. By this bye-law it was 'prohibited to use from any steamer or steamship, or vessel propelled by steam, the method of fishing known as beam-trawling or other (*sic*) trawling off the coast of the counties of Cork, Waterford, or Wexford, situated within an imaginary line from Ballycottin Pier to the lighthouse on Ballycottin Island, and thence in an easterly direction to Hook Head in the county of Wexford, and also within the distance of three miles seaward of said imaginary line.'

"3. The said bye-law was made under the provisions of the 'Steam Trawling (Ireland) Act, 1889,' by section 3, sub-section 1, whereof, it was provided that the Inspectors of Irish Fisheries might make bye-laws in the manner and under the regulations in the Fisheries Act, 1842 (5 & 6 Vict. c. 106), mentioned, prohibiting the use, in or from any steamer or steamship, or vessel propelled by steam, of the method of fishing known as beam-trawling or other (*sic*) trawling within three miles of low-water mark of any part of the coast of Ireland, or within the waters of any other defined areas, specified in any such bye-law, and subject to any conditions or regulations contained in such bye-laws.

(1) The defendant did not question the jurisdiction to issue the summons, and appeared at the Court of Petty Sessions.

"4. By section 3, sub-sect. 2, of the said Act the penalty for using any trawl net in contravention of any such bye-law was declared to be a fine not exceeding £5 for the first offence and forfeiture of nets and other matters fastened thereto.

"5. By section 91 of the said Act of the 5 & 6 Vict. c. 106, it was provided that bye-laws should not be repugnant to any law or statute in force in Ireland, and should be approved of and confirmed by the Lord Lieutenant of Ireland in Council, and when so approved and confirmed should be binding and conclusive on all persons as if the same had been contained in and enacted by the said Act.

"6. By section 96 of the same Act, it was enacted (*inter alia*) that the jurisdiction of the Justices of the Peace within counties in Ireland, any part whereof should adjoin the sea coast, should be extended to offences against the provisions of any bye-law (thereby authorised to be made) committed by fishermen and others engaged in fishing, or by any person or persons whatsoever, while at sea, as fully and effectually to all intents and purposes as if the said offences had been committed upon land within their present jurisdictions.

"7. Captain Thomas Brady, the master of the steamer 'Granuaila,' was examined as a witness on behalf of the complainant, and deposed that he was a sea fishery officer appointed by the Agricultural Department, and was on the night of the 9th February, 1901, in charge of his ship in Dungarvan Bay. He saw the steam trawler 'General Roberts' with fishing lights up, and boarded her and found her fishing with an otter trawl. The witness produced an Admiralty chart upon which he had laid down a line from the lighthouse on Ballycottin Island to Hook Head, and upon which he had also laid down and shown by a red line a distance three miles seaward of the said line. He proved that the inside line coloured blue on the chart truly represented the imaginary line from the lighthouse on Ballycottin Island to Hook Head, mentioned in the said bye-law, and that the outside line coloured red truly represented the line three miles to seaward of the said imaginary line, also mentioned in the said bye-law. The chart produced by the said Thomas Brady was received by us in evidence and retained by our clerk, and we beg to refer to

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same. The defendant was the master of 'The General Roberts,' and was in charge. The place where the defendant was fishing was proved to be between the outer and inner lines laid down upon the said chart by the said Thomas Brady. He proved the exact place to be the spot indicated by the circle marked red on the said chart.

"8. The solicitor for the defendant then contended that the said bye-law was invalid and inoperative as being unreasonable and made *ultra vires* the Inspectors, inasmuch as it purported to prohibit steam trawling by all persons whatsoever, whether subjects of the United Kingdom or otherwise, over an area extending beyond the dominions of the Sovereign of the United Kingdom and outside the territorial jurisdiction. He further contended that the said bye-law was invalid, as being repugnant, within the meaning of the said 91st section of the 5 & 6 Vict. c. 106, to divers statutes in force in Ireland, and, amongst others, to the Act of the 41 & 42 Vict. c. 73, to which we beg to refer. The said solicitor also referred to the case of *Pidler* v. *Berry* (1), as deciding that if a bye-law is invalid, Justices are not bound to convict persons infringing the same. No report of this case was produced to us.

"9. The solicitor for the defendant mentioned in the course of his statement a bye-law which (he stated) had also been made by the said Commissioners of Fisheries under the Steam Trawling (Ireland) Act, 1889, which, according to his statement, purported to extend to an area exceeding three miles from low-water mark. He stated that this bye-law had been rejected on appeal by the Lord Lieutenant in Council. The solicitor for the complainant objected to the statements in this paragraph mentioned being made, and thereupon no evidence as to the said bye-law or as to what had taken place on appeal regarding it, was given on behalf of the defendant.

"10. Mr. John Rae, an engineer, was examined as a witness on behalf of the defendant. He produced and proved an Admiralty map or chart of the south coast of Ireland, including the area mentioned in the present bye-law, and proved that the three miles

(1) 59 L. T. (N. S.) 230.

(geographical) distance from low-water mark of the part of the land of Ireland next adjoining the area specified in the bye-law, allowing for bays whose headlands were less than ten miles apart, was the red dotted line marked by him on the said chart. He also proved that the two straight lines marked on the said chart truly represented the two imaginary lines mentioned in the said bye-law. We refer to the said chart marked by Mr. R. Longan, Clerk of Petty Sessions.

"On behalf of the plaintiff it was in reply contended that it was not competent to us to consider the question of the validity of the bye-law; that we were bound to take it as an Act of Parliament, and to convict the defendant thereunder as being a British subject, if satisfied that the defendant had infringed it; and that, even if the bye-law could not be enforced against foreigners, that fact was immaterial in the present case, the defendant being, and being admitted to be, a British subject. The solicitor for the plaintiff also referred us to *The Institute of Patent Agents* v. *Lockwood* (1), and to *Reg.* (*Conyngham*) v. *The Pharmaceutical Society of Ireland* (2)."

The Justices stated that they were satisfied on the evidence that the defendant had used from a steamer an otter-trawl within the limits specified in the said bye-law, but at a place distant more than three geographical miles from low-water mark of the coast of Ireland; that, as they deemed themselves bound by the bye-law, the same having been made by the Inspectors of Fisheries, and confirmed by the Lord Lieutenant in Council, they considered that it was not competent to them to consider or decide the question whether the same was for any reason unreasonable, invalid, or *ultra vires*; and they accordingly gave judgment against the defendant (Mr. William Orr, R.M., dissenting); and now submitted for the opinion of the Court, the question whether they were correct in point of law in their determination, or what should be done in the premises.

(1) [1894] App. Cas. 365. (2) [1896] 2 Ir. R. 308.

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Matheson, K. C., and *Hume*, K. C. (*Brady*, with them), for the appellant, the defendant below, argued that the statute of 1889 could not, in the absence of express terms, be held to give to the Inspectors of Irish Fisheries an unfettered jurisdiction to make bye-laws affecting non-territorial waters, nor in any event could such bye-laws affect foreigners beyond the three-mile limit accepted by the consent of nations as the extent of territorial sovereignty : *R.* v. *Keyn* (1). The Fishery statutes affecting this country were all of them by their titles and scope confined to " Ireland " and the " Fisheries of *Ireland*" ; and the " *other defined areas*," in the Steam Trawling (Ireland) Act, 1889, section 3 (1) must be construed to mean other areas as defined by the *Irish* Fishery Code, and by international law, and not extended to give to the Inspectors an utterly uncontrolled jurisdiction. In the Scotch Act of 1889, even if it were admissible, as *in pari materia*, to assist the construction of the Irish Act, it was the Legislature itself that had overstepped the three-mile limit, but this was done by express enactment.

The Solicitor-General (*George Wright*, *K.C.*), and *Morphy*, for the Crown, contended that in any event this bye-law was valid as regarded subjects of His Majesty ; that it was essential, for the protection of fisheries within strictly territorial waters, to protect the spawning grounds lying further out to sea ; that this was done in regard to the Scotch fisheries by the Act itself (52 & 53 Vict. c. 23) ; while, as to Ireland, Parliament had vested a discretion in the Inspectors as to what it was necessary to do ; and that *other defined areas* must mean other areas to be defined by the Inspectors.

[Counsel cited and discussed *R.* v. *Keyn* (1) ; *Cope* v. *Doherty* (2) and *Pidler* v. *Berry* (3) ; The Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45) ; *Whyte* v. *Thompson* (4) ; The Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22) ; The Territorial Waters Act, 1878 (41 & 42 Vict. c. 43) ; The Irish Fisheries Act, 1842 (5 & 6 Vict. c. 106), and Amending Acts ; and Hall's International Law, p. 70.

(1) 2 Ex. Div. 63.
(2) 2 De G. & J. 614.
(3) 59 L. T. (N. S.) 230.
(4) 24 Sess. Cas. 35.

BOYD, J.:—

The question for our decision in the present case is, whether a bye-law made by the Inspectors of Irish Fisheries on 10th July, 1897, and approved by the Lord Lieutenant and Privy Council in Ireland on the 4th November 1897, is invalid and inoperative, as being unreasonable and made *ultra vires*, inasmuch as it purported to prohibit steam trawling by all persons whatsoever, whether subjects of the United Kingdom or otherwise, over an area extending beyond the dominion of the Sovereign of the United Kingdom and outside the territorial jurisdiction.

The bye-law in question was made under section 3, sub-section 1, of "The Steam Trawling (Ireland) Act, 1889," (52 & 53 Vict. c. 74), which enables the Inspectors of Irish Fisheries to make bye-laws "prohibiting the use, in or from any steamer or steamship, or vessel propelled by steam, of the method of fishing known as beam trawling or other trawling within three miles of low-water mark of any part of the coast of Ireland *or within the waters of any other defined areas specified in any such bye-law.*"

From a very remote period down to the present time, very many statutes have been passed either by the Parliament of Ireland or of the United Kingdom for the protection and encouragement of the fisheries "*of*" and "*in* Ireland," and it is to be observed that in these statutes the use of these words, "*of*" and "*in*," is not indiscriminate. Where the general fisheries of the country are the object of the Acts, the former is used; but when the inland fisheries, or those partaking of that character, are alone provided for, the latter is used. These statutes have been passed for the benefit of the public, and not to protect private interests; and the number of the statutes that the Legislature has passed shows how great and important the subject was and is to the material welfare of the public of this country. I consider the sea fisheries of Ireland are most important to be protected, not only by reason of the value of such portion of the take of fish as may be exported, but of the still greater value of the portion used as an article of food in the country. Surely, herrings, mackerel, cod, haddock, and many other kinds of valuable fish, systematically caught off the coasts of Ireland, must be included in the fisheries of Ireland;

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and these fish are mostly caught more distant than three miles from the coast.

By section 91 of 5 & 6 Vict. c. 106, the Commissioners were empowered to make such bye-laws "as to them shall seem expedient for the more effectual government, management, protection, and improvement of the fisheries of Ireland . . . and to impose and prescribe any conditions and *restrictions* for the regulation of the said fisheries, and the preservation of good order among the persons engaged therein, and in relation to . . . the times and places or the manner in which any trammel, trawl, or other net . . . shall be used . . . or to the prohibition thereof, or of any practice whatsoever tending in the opinion of the said Commissioners . . . to be in any manner detrimental to the said fisheries, or as to any other matter or thing which shall in any manner relate to the government and protection of the said fisheries." These provisions are very extensive, and the sole limitation imposed by the section is, "Provided always that all such bye-laws, rules, orders, and regulations, be not repugnant to any *law or statute* in force in Ireland." When approved by the Lord Lieutenant in Council, such bye-laws are binding and conclusive as if they had been included in the Act.

In that section there is no limitation as to the locality or place to which the bye-laws shall extend, and section 96 confers jurisdiction on the magistrates therein mentioned to decide as to offences against the provisions of the Act, or bye-laws, by fishermen or others engaged in fishing, or by any person or persons whatsoever *while at sea.*

I am not aware that any of the foregoing provisions in the bye-law are "repugnant to any law or statute in force in Ireland." Section 7 of 7 & 8 Vict. c. 108 permits the use of seine nets for herring fishing in the day-time (which was forbidden by 5 & 6 Vict. c. 107, s. 7), "save and except in such places and at such times as shall or may hereafter be forbidden by any bye-law, rule, or regulation, to be hereafter made by the said Commissioners," thus enabling the Commissioners, without limitation, to fix the places where such may be done.

By the statute, 52 & 53 Vict. c. 74, sect. 1, sub-sect. 3, it is enacted that the Inspectors of Irish Fisheries may prohibit the use

of trawls by steamers "within three miles of low-water mark of any part of the coast of Ireland, or within the waters of *any other defined areas specified in such bye-law*, and subject to any conditions or regulations contained in such bye-laws." This Act was passed in the same session as the Act to regulate the Scotch Fisheries (52 & 53 Vict. c. 23), but subsequent to that Act. By the Scotch Act fishing inside certain defined areas mentioned in the Act, which are far outside the three-mile limit, is permitted under certain provisions. No defined areas and no similar provisions are mentioned in the Irish Act; but the Inspectors of Irish Fisheries are given the ample powers mentioned in the section to which I have referred, to fix the areas to which their prohibition may extend. There are no Inspectors of Fisheries in Scotland with powers similar to those conferred on the Irish Inspectors, and apparently it was considered by Parliament that it was desirable to confide to the Irish Inspectors the power of fixing the areas instead of fixing them in the Act.

The three-mile limit is a matter fixed by conventions with foreign powers, and is not fixed by Act of Parliament, except in Acts passed for the purposes of ratifying such conventions.

The bye-law impeached in the present case, it is to be observed, does not prohibit the taking of fish in the defined area, but only prohibits a mode of fishing which is considered injurious to the fishery.

On the whole review of the statutes, I am of opinion that the Irish Inspectors have the power to fix the areas of prohibition, irrespective of the distance from the shores of Ireland; and that their bye-laws are binding on British subjects in the areas fixed by the Inspectors. No question of international law arises in the present case, as the defendant is a British subject. The conviction in the present case should be affirmed.

GIBSON, J.:—

The offence in this case was committed five miles out from the coast, in a part of the open sea not forming a bay or arm of the sea, or lying between headlands. We are, therefore, free from any question of quasi-territorial jurisdiction at common law, such as was discussed by Lord Blackburn in the *Conception*

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Bay Case (1). The question before us is as to the validity of bye-laws affecting the open sea.

To arrive at the true construction of the Act of 1889 we must consider the history of the legislation relating to Irish Fisheries. Before 5 & 6 Vict. c. 106, there were two statutes relating to trawling—13 & 14 Geo. 3, c. 41, which prohibited trawling in Dublin Bay; and 15 & 16 Geo. 3, c. 13, which prohibited trawling in the "Broad of Lamb-Bay" between the east point of Howth and the east point of Lambay. Another statute—7 Geo. 4, c. 34—prohibited the use of trammel nets on the Irish coast, or in any bay, harbour, river, or creek. 31 Geo. 2, c. 13, forbade fishing for herrings in the day-time in any harbour. These were the only statutes that I know of defining and limiting the area of Irish *marine* fishing operations.

5 & 6 Vict. c. 106, intituled "An Act to regulate the Irish Fisheries," recites these and other Acts, which it describes in its preamble as relating to the "Fisheries of Ireland"—an expression which is nowhere defined, and the meaning of which must be collected from the context of the legislation. The power of making bye-laws given by section 91 is limited to the government, management, protection, and improvement of "the Fisheries of Ireland." What does this phrase mean? From the history of the legislation and from the purview of the Act, it appears difficult to extend its signification beyond fisheries in inland waters, and estuaries, arms of the sea *inter fauces terræ*, and sea waters in proximity to the shore, all of which are described commonly as territorial waters. The provisions of section 92, requiring copies of bye-laws to be deposited with Clerks of the Peace and of the Petty Sessions Districts where it is proposed that such bye-laws shall be enforced, and giving a power of appeal against such bye-laws—section 93 as to the publication of bye-laws—and sections 94 and 96 as to the mode of trial of offences, and as to the jurisdiction of the Court,—strongly point to the jurisdiction being limited in point of area, and to the obligation being confined. Under this statute could a bye-law be made prohibiting trawling twenty miles out from the shore, far outside territorial waters? It may be said that sections 7, 8, and 9 relate to the sea generally,

(1) 2 App. Cas. 394.

and that no restriction can there be implied. Looking at the context of the 7th and 8th sections, which prohibit the setting of nets in the day-time absolutely, without reference to any bye-law—I think that they are confined to territorial waters. "Sea" cannot mean the entire ocean in all its parts. The meaning of "estuary" was considered in the important joint opinion of Mr. R. Palmer and Mr. G. Mellish, 28th December, 1869, printed among the Irish Fishery papers. Those distinguished lawyers were of opinion that the provisions of 13 & 14 Vict. c. 88, section 1, that "estuary" should include and extend to any harbour or roadstead, meant simply that an estuary, properly so called, should not cease to be one because it happened to be also a harbour or roadstead; and that the limits of the estuary to seaward were to be decided by the configuration of the land in either side of the channel.

I do not find in this, or the previous legislation, any jurisdiction to make bye-laws giving jurisdiction outside territorial waters generally. The expression, "Fisheries of Ireland," in the statute must be understood in this restricted sense; it cannot be enlarged by bye-laws so as to include the high seas.

The three-mile limit is introduced in the statute, 26 & 27 Vict. c. 114, in reference to the use of bag-nets within three statute miles from the mouth of a river, as defined by the Commissioners.

The *Franconia Case* (1) was decided in 1876; and, in 1878, the Territorial Waters Jurisdiction Act was passed. "The Territorial Waters of Her Majesty's dominions" are thereby defined in accordance with international law. Subsequently the North Sea Convention of 1882 was entered into. It is on much the same lines as the French Convention, ratified in 1868 by the statute 31 & 32 Vict. c. 45. The North Sea Convention was confirmed by the Sea Fisheries Act, 1883, c. 22. Under Article 2, exclusive fishing rights were to be enjoyed within the three-mile area along the coast and islands of the respective countries, signatories of the Convention. In case of bays, the three miles were to be measured from a straight line across the bay at the point nearest the entrance where first the width did not exceed ten miles.

(1) *Reg.* v. *Keyn*, 2 Ex. Div. 63.

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The parliamentary recognition of international law is evidenced in all the subsequent English and Scotch Fishery Acts.

The Scotch Act of 1885, c. 70, enables the Fishery Board, by bye-laws, to restrict or prohibit any method of sea-fishing injurious to any kind of sea-fishing in any part of the sea adjoining Scotland, and within the exclusive fishery limits of the British Islands.

Under the English Act of 1888, c. 54, the Board of Trade, on the application of a county or borough council, might, by order, create a sea-fisheries district, comprising any part of the sea within which there is, by international law, the exclusive right of fishing; every such order was to be laid within thirty days before both Houses of Parliament while in session, and either House could, by resolution, annul such order. Section 2 vested in the local fisheries committee power to make bye-laws for restricting or prohibiting any method of fishing for sea-fish.

Under both these Acts it would seem that trawling could have been prohibited; but the prohibited area was strictly confined within the boundary prescribed by international law.

The Irish Act of 1888, c. 30, passed just before the English statute, enabled the owners of registered fishing boats in a district to petition the Fishery Inspectors to prohibit trawling (not merely steam trawling) "within certain limits in the vicinity"; and the Inspectors were authorised to make bye-laws for that purpose under the statute 5 & 6 Vict. c. 106. As that Act was, in my opinion, restricted to territorial waters, I am unable to construe the word "vicinity" as having a larger operation. Comparison with the English enactment makes any other construction improbable.

Up to the year 1888, there was no statute in England, Ireland, or Scotland, enabling bye-laws to be made affecting fishing outside territorial waters. It is, however, said that in 1889 the Legislature made a new departure, and delegated to the local Irish authority the quasi-legislative power of bringing extra-territorial waters within their jurisdiction for the purpose of one particular kind of trawling—namely, steam-trawling.

The Irish statute was passed on August 13, 1889. On the 26th July previously there was passed a Scotch Act applicable to Scotland and the parts of the sea adjoining Scotland (1). Counsel on

(1) 52 & 53 Vict. c. 23.

both sides have discussed and relied on its provisions, particularly sections 6 and 7. The waters subject to the Act are the sea within the three-mile limit and certain areas lying between promontories or islands which might be considered territorial waters. Section 6 prohibits beam or otter trawling, (*a*) within three miles of low-water mark of any part of the coast of Scotland; (*b*) within the scheduled waters, save only between such points on the coast or within such other defined areas as may from time to time be permitted by bye-laws of the Scotch Fishery Board; but the section was not to apply to "Solway Firth or Pentland Firth."

The power of making bye-laws was circumscribed in this section by the three-mile limit on the coast generally, save where the extended scheduled area was made applicable. The power of permitting something otherwise forbidden is limited by the area of prohibition. The plan of the section is prohibition with a power of withdrawing defined areas from the operation of the prohibition.

Section 7 reverses this plan, and enables bye-laws of a prohibitive (not a permissive) character to be made in respect of the space between Duncansby Head and Rattray Point—that is the Moray Firth.

The scheme of the Act is to enable the Scotch Fishery Board to act within certain geographical limits prescribed by Parliament itself. No power of exceeding those limits is given to the Fishery Board. So far as the limits defined by the Legislature may go beyond what is recognised by international law, foreigners may not be affected, though subjects unquestionably are bound by the municipal law. It was held in *Wilson* v. *Rust* (1) that a bye-law could be made under section 7 proclaiming the entire Moray Firth.

The next Act mentioned by counsel was the Scotch Act of 1895, c. 42, section 10 of which enables the Fishery Board, by bye-law, to prohibit beam and otter trawling in any area or areas under the jurisdiction of Her Majesty, within thirteen miles of the Scottish coast subject (amongst others) to the proviso that no area of sea within the said limit of thirteen miles should be

(1) 23 Rettie J. C., p. 56.

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deemed within such jurisdiction unless the powers conferred by the section should have been accepted as binding on their own subjects by all the States, signatories of the Convention of 1882. It was held in *Wilson* v. *Rust* (1) that the provisions of section 7 of the Act of 1889 were not inconsistent with the thirteen-mile limit hereby created, any more than with the three-mile mentioned in the Act of 1889.

I now take up the Irish Act of 1889. The title throws no light on the construction. The "certain distance" is, like the "certain limits" in the Act of 1888, c. 30, to be ascertained by what the Act in its body says.

The statute does not follow the method of section 6 of the Scotch Act—prohibition with power of exemption—but goes on the lines of the English Act of 1888 (c. 54), and the Scotch Acts of 1889, section 7, and 1895, section 10. The question is whether the Legislature has given to Ireland powers which it has not conferred on the English Board of Trade, and Scotch Fishery Board, whose area of jurisdiction is carefully limited and defined. Section 3 enables the Inspectors to make, alter, and revoke bye-laws in the manner and under the regulations in the Fisheries Act, 1842—which is confined to Irish fisheries in territorial waters—prohibiting steam trawling within three miles of low-water mark of any part of the coast of Ireland, or within the waters of any other defined areas specified in such bye-law. "Defined" means, I think, to be defined by the Inspectors in the bye-laws." Three constructions offer themselves. "Other defined areas" means (*a*), as in the Scotch Act of 1889, section 6, an area within the three-mile line; (*b*) or an area within territorial waters, whether lying *inter fauces terræ* at common law, or as extended by conventions ratified by statute; or (*c*) an area irrespective of, or outside, the three-mile limit. The "otter trawling" of the Scotch Act becomes "other trawling" in the Irish.

Whatever construction be adopted, it would seem to render one and other member of the section more or less redundant. If the third construction be adopted, and bye-laws may be made prohibiting steam-trawling inside or outside the three-mile limit, it

(1) 23 Rettie J. C., p. 56.

was obviously unnecessary to refer to the three-mile limit at all. On the other hand, if the first construction is adopted, and the operation of bye-laws is circumscribed within the three-mile limit, why was not the drafting found in the 7th section of the Scotch Act, or some similar form, adopted? It would look as if the words "other defined areas" were imported into the Irish Act from the Scotch Act, section 6. In the Scotch Act, from its scheme, the expression must mean "defined area within the three-mile limit" where the schedule did not apply; but the plan of the Irish Act is no doubt different.

The arguments in favour of the restricted construction contended for by the defendant are of some weight:—(1) the Act of 1842, expressly incorporated in section 3, is confined to territorial waters; (2) the Act of 1888 is similarly confined; (3) the legislation from 31 & 32 Vict. c. 45, to the Act of 1883, shows that Parliament was dealing as to fishery rights with the States of Europe on the basis of international law; (4) the English statute of 1888, and the Scotch Acts of 1885, 1889, and 1895, restrict the making of bye-laws to territorial waters proper, or to bays, firths, &c., which might be so considered, and which are specifically defined by Parliament itself; (5) the Irish Act of 1889, unlike the other statutes, is confined to steam trawling, and leaves ordinary Irish trawling to be governed by the three-mile limit. Why should there be a distinction between the two? Bye-laws under the Scotch and English legislation, as well as under the Irish Act of 1888, could be made in reference to all trawling, whether by steam or otherwise. (6) The language ought to be clear and unambiguous to justify the Court in holding that rights over extra-territorial waters have been conferred. Even supposing that foreigners would not be affected by the bye-law, it would require explicit language to justify the Court in holding that it was intended to delegate a jurisdiction of an unlimited extent which might enure for the benefit of foreigners at the expense of subjects, and which is opposed to the general scheme of legislation found in the Acts relating to England and Scotland.

Two arguments in favour of the extended construction require notice. The first is—why was the Act passed at all if it does not extend previous limits? My answer is that the Act of 1888 gave

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no initiative to the Inspectors, and the word "vicinity" was ambiguous. It was desirable, as in the Scotch Act of 1889, to define the area within which bye-laws were to operate. The second argument is that the restricted construction places an unjustifiable limit on the words "any other defined areas." I admit that these words are *prima facie* universal. But they must receive some kind of implied limitation. They do not extend to the entire ocean. The words are unhappily chosen, and were probably copied from the Scotch Act, where (in another context no doubt) they must mean an area inside defined limits settled by Parliament. The most obvious limit for the purposes of our Act is found in the express reference to the Act of 1842, which is restricted to the fisheries of Ireland, and in the principles of international law recognised in all the recent statutes.

It has been suggested that the protection against the mischief done by trawling will be useless if the present bye-law is declared invalid; but the mischief and remedy were alike for the consideration and determination of Parliament. A remedy which is sufficient for all England, and the greater part of the coast of Scotland, possibly might be deemed to be adequate to the needs of Ireland.

Some reliance was placed on the fact of bye-laws of a similar character having been allowed without objection by the Privy Council. In the last case, however, where a bye-law of this type came up for confirmation—the only one where there was opposition or argument—the Privy Council rejected the bye-law. No reasons were stated. The statute is too recent to be interpreted by usage, and in construing it I pay no attention to the allowance or disallowance of a few similar bye-laws previously.

Of the three possible constructions above suggested, the first and second are more in harmony with the history and principles of our legislation than the third. The language of the statute does not exclude either construction. According to the first, the three-mile space is treated as one area; the other area is any less space defined inside that larger area. This is the method adopted in section 6 of the Scotch Act. The second construction takes, first, the three-mile space, and then any less or greater area within territorial waters. There would thus (as in the English Act) be no

rigid limit of three miles. The drafting is no doubt cumbrous, awkward, and redundant; but the same remark applies to the wide construction. The limited constructions (between which I am not now compelled to choose) are at least safe; they avoid the danger of violating international law (if foreigners are bound) on the one hand; and, on the other, they are free from the apparent unfairness (if foreigners are not bound) of subjecting British subjects to a restriction from which aliens are free. The difficulty as to local jurisdiction with an unrestricted area of prohibition, I need not discuss.

My view is like Lord Bramwell's in the *Franconia Case* (1). "If it is a measuring cast which opinion is right, I think we ought to leave it to the Legislature, and not make a law ourselves with imperfect powers." If Parliament intended to vest in the Irish fishery authority such new, sweeping, and unprecedented jurisdiction as counsel for the prosecutor assert, that intention has been expressed in such an ambiguous fashion that it cannot receive effect.

The Solicitor-General also contended that, by virtue of section 91 of the Act of 1842, the bye-law had the effect of statute; and, even if *ultra vires*, must be accepted as legal. The power of making bye-laws is only given for certain limited purposes: and it is hopeless to contend that an uncontrolled and irresponsible power of making illegal bye-laws has been delegated by Parliament. *Lockwood's Case* (2) has no application whatever: see *Conyngham's Case* (3).

ANDREWS, J.:—

This was a prosecution at the Dungarvan Petty Sessions held on the 2nd of last March, in which the defendant was charged with having, off the coast of the county Waterford, within a prohibited area, unlawfully used from a steamer the method of fishing known as otter-trawling. The facts were not in dispute. The prohibited area within which the fishing complained of took place, was defined by a bye-law dated the 10th July, 1897, made by the

(1) 2 Ex. D. 150. (2) [1894] A. C. 347. (3) [1899] 2 I. R. 132.

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Inspectors of Irish Fisheries under the authority of the Steam Trawling (Ireland) Act, 1889 (52 & 53 Vict. c. 74), and approved of and confirmed by the Lord Lieutenant in Council on the 4th November, 1897, whereby it was prohibited to use from any steamer "the method of fishing known as beam-trawling or other trawling off the coast of the counties of Cork, Waterford, and Wexford, situated within a line from Ballycottin pier to the light-house on Ballycottin Island, and thence in an easterly direction to Hook Head in the county of Wexford, *and also within the distance of three miles seaward of the said line.*"

The place where the defendant was found fishing in the manner complained of lay within this distance of three miles seaward of the line mentioned in the bye-law, but outside the belt of water extending for three geographical miles from the coast at low-water mark, or for a marine league from the coast at low-water mark; and the area prohibited by the bye-law extended, as we were informed, to about twelve miles from the coast, excluding bays the headlands of which did not exceed the distance of ten miles apart. The contention for the defendant before the Justices at Petty Sessions was that the bye-law was *ultra vires* and invalid, as including within the thereby prohibited area part of the sea beyond what was deemed by international law to be within the territorial sovereignty of His Majesty. The majority of the Justices considered that they were bound by the bye-law, and imposed a fine of £5 upon the defendant, at whose instance they stated a case for the opinion of this Court, pursuant to the Act 20 & 21 Vict. c. 43, in order to obtain a decision whether they were correct in their determination in point of law.

The contention for the defendant at the argument of the case before us was the same as his contention before the Justices; and the question turns on the construction of the Steam Trawling (Ireland) Act, 1889, which I shall hereafter refer to as the Irish Act of 1889.

I proceed, therefore, to examine the provisions of that Act; and I shall consider, in the first place, what its true construction is, irrespective of international law. The object of the Act, as disclosed by its title, was "to enable the Inspectors of Irish Fisheries" (whom I shall hereafter refer to as the Inspectors) "to

prohibit steam-trawling within a certain distance of the coast of Ireland." In order to give effect to this, it was enacted by section 3, sub-section 1, that the Inspectors might from time to time make, alter, and revoke bye-laws under the regulations in the Fisheries Act, 1842 (5 & 6 Vict. c. 106, which I shall hereafter refer to as the Act of 1842), prohibiting the use, from any steamer, "of beam trawling or other trawling within three miles of low-water mark of any part of the coast of Ireland; *or within the waters of any other defined areas specified in any such bye-law*"; and sub-section 2 prescribed the fines for the contravention of any such bye-law.

Now, the object of this Act being to protect Irish Fisheries, and prevent steam-trawling within a certain distance of the Irish coast, and the three miles referred to in sub-section 1 being three miles from the Irish coast, and the Act being exclusively an Irish Act, I am of opinion that the reasonable and true construction of the words "or within the waters of any other defined areas specified in any such bye-law" is, "or within any other Irish coast area, defined by and specified in the bye-law, within which the Inspectors should consider it requisite for the protection of the Irish Fisheries to prohibit steam-trawling"; and that it was left to the judgment and discretion of the experienced and trusted men who were appointed Inspectors, to determine what the limits of such other defined areas should be. There is not, in my opinion, anything unreasonable in conferring such a power on the Inspectors, especially when we consider the regulations under which these bye-laws must be made, as prescribed by the 92nd section of the Act of 1842, which enacts that, a month at least before such bye-laws shall be laid before the Lord Lieutenant in Council, a copy thereof shall be deposited with the Clerk of the Peace for each county, and with the Clerks of the Petty Sessions for each district, in which they are proposed to be enforced; and that a notice of the lodgment thereof shall be posted in each such Petty Sessions district; and that any person considering himself aggrieved by any such intended bye-law may appeal to the Lord Lieutenant in Council against it. No previous Irish Fishery Act has forbidden such a bye-law as the one in question; and it will be observed that, under section 3, sub-section 1, of the Irish Act of 1889, the Inspectors

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have power not only to make the bye-laws thereby authorised, but also to alter and revoke them under the same regulations. The bye-law in question shows that, in the judgment of the Inspectors, the due protection of the Irish Fisheries required that steam-trawling should be prevented within a distance exceeding three miles from the coast of the counties therein referred to; and, apart from any doctrine of international law, and construing the Irish Act of 1889 as I do, I would have no doubt that the bye-law in question is both reasonable in itself, and also valid as within the powers of the Inspectors, the exercise of which in making the bye-law has been approved of by the Lord Lieutenant in Council.

But it is said that this bye-law purports to disregard international law by prohibiting in general terms all steam-trawling within an area a substantial portion of which extends beyond the limits of three geographical miles, or one marine league, from the coast of Ireland; and that, as this could not have been intended to be authorised by the Irish Act of 1889, the bye-law ought to be held to be *ultra vires* and invalid.

Now I shall consider this objection in the first place on the assumption that the general prohibition in the bye-law extends seaward beyond the limits recognised by international law as the boundary of the territorial jurisdiction of the Sovereign of the United Kingdom. It is admitted that Parliament, with the Sovereign's assent, can bind the subjects of the United Kingdom (of whom the defendant is one) outside those limits; and it has been pointed out that, by the Herring Fishery (Scotland) Act, 1889, 52 & 53 Vict. c. 23 (passed in the same Session as the Irish Act of 1889), it has by express legislation done so. The prohibited areas under the Scotch Act of 1889 extend greatly further from the coast seaward than the prohibited area in the bye-law in question; and the prohibition is in terms general and unrestricted. It cannot, therefore, be said that this is a thing which Parliament will not do; but it is said that when Parliament does it, it does it expressly. I do not think that we can construe an Irish Act—which is to be carried into effect as regards bye-laws by certain specified persons (the Inspectors), and under certain specified regulations—by a Scotch Act, though passed in the same session,

which is to be carried into effect by persons different from the Inspectors, viz. the Fishery Board for Scotland, and not under the same regulations; but the policy of these two Acts was the same, viz. the protection, as regards Ireland, of Irish fisheries, and the protection, as regards Scotland, of Scotch fisheries; and as the prohibited area in the Scotch Act went far beyond the three-mile limit seaward from the Scotch coast, I can see no valid reason for restricting the areas which may be prohibited by bye-laws under the Irish Act to a three-mile limit seaward from the Irish coast; and the difference in the particular manner in which the two Acts are framed does not lead me in any way to the conclusion that there was any difference in policy between them.

It may also be that the reference in the Irish Act of 1889 to the limit of three miles from any part of the coast of Ireland was intended to show that the words which follow, viz. —"or within the waters of any other defined areas specified in any such bye-law,—were added to give express power to prohibit steam-trawling within a more extended area, if this should be considered requisite for the protection of Irish Fisheries, and thus to do, by express bye-law, what the Scotch Act had done by express enactment. If the intention of Parliament in the Irish Act of 1889 was to limit the bye-laws to be made thereunder to the prohibition of an area within the three-mile limit, or, if it be so desired to express it, within the limits of territorial jurisdiction recognised by international law, it seems strange that language should have been employed which is so inadequate to give expression to that intention, which could have been so easily expressed in a few plain words. It is said that the three-mile limit is, as far as Irish Fishery legislation is concerned, mentioned in the Irish Act of 1889 for the first time. May it not then be also said that it is mentioned, as the context shows, for the very purpose of making it clear that that limit might be extended by the bye-laws authorised by the Act? Why, upon either the reason or the policy of the prohibition, ought we to restrict the generality of the words "any other defined areas specified in any such bye-law," to areas within the three-mile limit? For I cannot at all accept the suggested construction that "other defined areas" mean already defined by nature, or man, and specified as such in the

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bye-laws. I think it clear that "the defined areas" referred to mean areas to be defined by the bye-laws themselves.

Now, still considering the Irish Act of 1889 on the assumption that the general prohibition in the bye-law in question extends seaward beyond the limits of the territorial jurisdiction of the Sovereign of the United Kingdom over foreigners, it was, if I may venture to so express myself, well said by Lord Stowell, in the case of *Le Louis* (1), with reference to the application of the Slave Trade Act to a foreign ship,—"Neither this British Act of Parliament nor any Commission founded upon it can affect any right or interest of foreigners unless they are founded on principles and impose regulations that are consistent with the law of nations. This is the only law that Great Britain can apply to them, and the generality of any terms employed in an Act of Parliament must be narrowed in construction by a religious adherence thereto." And in *Cope* v. *Doherty* (2), referring to the general terms of the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 504, Lord Justice Turner said—"This is a British Act of Parliament, and it is not, I think, to be presumed that the British Parliament could intend to legislate as to the rights and liabilities of foreigners. In order to warrant such a conclusion, I think that either the words of the Act ought to be express, or the context of it very clear."

Upon this principle, and upon the assumption I have referred to, I would be quite prepared to hold that neither the Scotch Act of 1889 nor the bye-law in question under the Irish Act of 1889, ought to be construed as applicable to the acts of foreigners outside the three-mile territorial limit, and that they ought to be restricted to British subjects only, of whom the defendant is one; and, as regards the (as I think) somewhat *ad captandum* argument, that it would be strange if Parliament prohibited British subjects from using certain modes of fishing which foreigners were left free to exercise, and thus made what has been attractively described as "a preserve for foreigners,"—I think we may well consider how far Parliament may have thought it likely that foreigners would ever resort, and, if they did, to what extent they would resort, to

(1) 2 Dodson, 239. (2) 1 K. & J. 367; on appeal, 2 De G. & J. 614.

this so-called "preserve"; and that the benefit to Scotch and Irish fisheries, by excluding the many at home from injuring them within the prohibited area, outweighed the speculative possibility (as Parliament may have thought) of the few from foreign countries coming to fish there unaffected by the restrictions imposed on the many who were likely to injuriously fish there from home.

But I now wish to guard myself against being supposed either to concede, or to convey as my opinion, that to prohibit foreigners from fishing in a manner injurious to the fisheries of the United Kingdom outside the three-mile limit seaward of admitted territorial jurisdiction, is a breach of international law. I desire to offer no opinion on that grave question; but I may shortly explain why I do not wish to be taken as having done so. International law, as I venture to think, exists not by reason of the opinions of publicists and jurists, however valuable these may be as indications of, or reasons for, its existence, but by the mutual agreement of nations, which, when arrived at, may, I think, be regarded, in the present age at least, as founded on the reasonable protection to which the rights belonging to each nation are entitled in accordance with the principles of natural justice, and so limited as not to infringe upon the reasonable rights of other nations in accordance with the same principles. The apparently acknowledged limit of the territorial jurisdiction of any nation, bounded in whole or in part by the sea, to a distance of three geographical miles, or (which is not quite the same thing) one marine league seawards from low-water mark on the coast, seems to have been fixed at a time when that distance was estimated as the effective range of a cannon ball outwards for protection, or inwards for attack. It seems, from treaties, conventions, Acts of Parliament, and similar expressions of the agreement of nations, to be now regarded as the minimum limit; but an absolute limit for all purposes has never been agreed upon; and very different opinions, with reference to what the maximum limit should be, are expressed by eminent jurists who have written on the difficult, and in some respects still doubtful, or, it may, perhaps, be more accurately said, still unsettled questions, which arise in dealing with so comprehensive a subject as international law. That the three-mile limit does not apply to

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cases of piracy will be admitted, as piracy offends against the first principles on which international law is founded; but there is reason for believing that the three-mile limit does not apply to cases in which the revenue of a nation requires protection against smuggling, which would be an invasion of the individual right of the particular nation to protect its own revenue according to its own laws; and so, if the proprietary rights of a particular nation in relation to its own coast fisheries require for their reasonable protection restrictions on modes of fishing destructive thereof, or seriously injurious thereto, outside the three-mile limit, I see no good reason why, having regard to the mutually just and protective principles on which international law is based, a reasonable general restriction on such destructive or injurious fishing beyond the three-mile limit seaward from the coast should be regarded as a breach of international law. I am not aware that such a question has ever been determined in such a way as to establish what the rule of international law is or ought to be upon it, apart from particular treaties, conventions, or Acts; and what I have said is intended to go no further than to explain why I desire not to be taken as directly, or indirectly, expressing any opinion upon it.

The conclusion, however, at which I have arrived in the present case is that the bye-law in question is certainly binding on British subjects; and that the determination of the Justices, in so far as it consisted in convicting the defendant of the offence he was charged with, and fining within the prescribed limit of the fine, was correct in point of law, and ought to be affirmed.

LORD O'BRIEN, L.C.J.:—

I concur in the result arrived at by my brothers Andrews and Boyd, and regret that I cannot claim the concurrence of my brother Gibson.

The policy and object of the Legislature in passing the Act of Parliament which we have to construe (52 & 53 Vict. cap. 74) was quite clear; and the language of the Act is, in my opinion, adapted to give effect to that policy; indeed, to construe the Act in the manner suggested on behalf of the defendant would be to restrict the ordinary meaning and effect of the words used in the

statute. What, then, was the object of the legislation? To preserve the fish by preventing trawling on certain fishing grounds.

It is, of course, common knowledge that these fishing grounds were within certain distances from the coast of Ireland, but situate, in very many instances, far more than three miles from low-water mark.

Did then the statute enable the Fishery Inspectors to define an area outside the three miles?

The Legislature had clearly power to give this authority to the Inspectors. Parliament can make laws to bind British subjects, wherever these subjects are. This is, of course, conceded. It is said that this would be an unreasonable intention to impute to the Legislature, because, while British subjects would be bound not to fish in the defined areas, foreigners would be at liberty to do so—that in fact it would be making a preserve for the foreigners. I am not influenced by this argument. The thing has been done before by the Scotch Act, which has been referred to at length by my brothers Andrews and Boyd.

The Scotch Act comprised a vast area beyond the three-mile limit; and though, in the Scotch Act, the outward limit was specified, I think it was much more convenient to leave the specification of the limit to the Inspectors, as has been done in the Irish statute.

The specification of various limits in various places would be done far more effectively by expert Commissioners than by discussion in the House of Commons. Besides, it is to be remembered that any bye-law, to be valid, must be approved by the Lord Lieutenant in Council.

If a discussion as to the requirements for the preservation of fish at different places off the coast all round Ireland was to be embarked on in the House of Commons, it might occupy a very long time indeed. If such a discussion commenced, I think the Horatian line would not be inapplicable: *Labitur et labetur in omne volubilis ævum.*

The statement as to the probable appearance of the Frenchman does not at all alarm me. His visits, if he comes at all, will be very few and very far between; and, should it transpire that he

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pays us more attention than we desire, the bye-law can be revoked so as to permit the defined areas to be open to all. However, experience shows that it is not the Frenchman that is so much to be apprehended as our nearer neighbours across the water, for whom our Houses of Parliament are competent to legislate.

What then is the legislation? The statute is intituled "An Act to enable the Inspectors of Fisheries to prohibit steam trawling within a certain distance of the coast of Ireland." This was the title; now let me look at the body of the Act. It enables the Inspectors to make bye-laws within three miles of low-water mark of any part of the coast of Ireland, "*or within the waters of any other defined areas specified in any such bye-law.*" The words "any other" are, in my opinion, quite large enough to comprise waters outside the three-mile limit; and to hold that they do not, would, in my opinion, be to restrict the ordinary meaning of the words, and to defeat the object and policy of the Legislature.

I am accordingly of opinion that the Magistrates were right in their conclusion.

Solicitor for the Crown: *Sir P. Coll.*

Solicitors for the defendant: *Richardson & Synnott.*

A. E. R. J.

IRISH LAND COMMISSION *v.* MOORE (1).

Appeal.
1901.
April 30.
May 1.
June 29.

Arrears of Rent (Ireland) Act, 1882—*Termination of tenant's interest—Eviction for non-payment of rent—Successor in title of landlord—Liability of landlord to pay.*

In and prior to 1882 the lands of Kilbride, in the county of Wicklow, were vested in trustees, upon trust for Mrs. M. for life, with remainder as she should appoint. One of the trustees was J. S. M., the husband of Mrs. M. In 1883 Q., a tenant on the estate, and J. S. M. obtained advances under the Arrears of Rent Act, and by charging orders, dated the 29th September, 1883, these two sums were charged on the lands, and made repayable by annual instalments for thirty-five years. J. S. M. and Mrs. M. died, and J. F. M., their son, succeeded to the property under an appointment from Mrs. M. The tenant Q. died in 1886, and was succeeded in the tenancy by L., who was ejected for non-payment of rent by J. F. M. in 1897. J. F. M. entered into possession of the holding, portion of which he let to K., retaining the residue in his own hands. The tenant paid the instalments of the annuity under the Arrears Act down to the date of the eviction. The Land Commission sued J. F. M. for the instalments accrued since the eviction:—

Held (by Lord Ashbourne, C., and Walker and Holmes, L.JJ., *diss.* Fitz-Gibbon, L.J.), that J. F. M. was liable.

CASE STATED by Madden, J., for the opinion of the Court, on the hearing of a civil bill appeal heard at the Spring Assizes at Wicklow. By civil bill dated the 12th September, 1899, the plaintiffs claimed to recover from the defendant £5 6*s.*, being the amount of rentcharges due to the plaintiffs from part of the lands of Carricknagower and Ballyfolane, in the Electoral Division of Kilbride, Poor Law Union of Naas, and county of Wicklow, by charging orders dated the 29th day of September, 1883, under the Arrears of Rent Act (Ireland), 1882, sect. 16, being two years of said rentcharges, from July 1st, 1897, to 1st January, 1899, inclusive. The civil bill process was the only proceeding taken by the plaintiffs to recover the amount of the said rentcharge now sued for.

The County Court Judge dismissed the civil bill, and the plaintiffs appealed. The appeal was heard before Madden, J., at the Spring Assizes at Wicklow, 1900.

The lands were vested in trustees, under the Moore Estates Act,

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L. JJ.

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1853 (16 & 17 Vict. c. vii), one of whom was Joseph Scott Moore, whose wife was tenant for life, with power of appointment. On her death on the 12th September, 1886, the defendant, J. Fletcher Moore, the son of the said J. Scott Moore and his wife, became seized of the said lands in fee-simple, under said settlement contained in the private Act and appointment.

On the 29th September, 1883, John Quinn, formerly tenant of said lands, in pursuance of sect. 16 of the Arrears of Rent (Ireland) Act, on the joint application of himself and the said Joseph S. Moore, obtained two advances of £8 and £45 respectively from the plaintiffs, and these two sums were by charging orders dated the 22th September, 1883, charged upon said lands, and made repayable by annuities of 8*s.* and £2 5*s.* respectively payable for thirty-five years, from the 1st July, 1883. The said John Quinn died in or about the year 1886, and William Lynch succeeded him in the holding and tenancy.

In April, 1897, the defendant recovered a decree in ejectment for nonpayment of rent against the said William Lynch, and entered into possession of the said holding, portion of which he subsequently re-let to Patrick Kearns, who is now in possession of the holding, and the defendant had the remaining portion in his own possession. The Judge found that the tenancy of the said John Quinn, and his successor Wm. Lynch was duly determined, and that the amount claimed in respect of the said annuity is still unpaid, but stated a case for the decision of the Queen's Bench.

The question for the decision of the Court was—Is the defendant liable to pay to the plaintiffs the sum of £5 6*s.*? The King's Bench Division, considering that they were bound by the decision of *Irish Land Commission* v. *Scannel* (1), decided in favour of the plaintiffs, and from that decision the defendant appealed.

Dudley White (with him *Wakely, K.C.*), for the appellant:—

The tenant alone is liable in the first instance under sect. 16 of the Arrears Act, and it is his interest that is primarily liable, and can be charged. Unless and until the Land Commission sold his tenancy to enforce their demand, no charge attaches upon the landlord's interest, nor does any personal liability arise against the landlord. The landlord's liability to pay the instalments of the

(1) 30 L. R. Ir. 287.

rentcharge was not merely contingent, but was also limited in amount, and it ceased when the tenancy upon which the instalments are a charge came to an end. If the tenancy was existing, the landlord did not become liable until in the first place the tenant had made default, and in the second place until there had been a sale of the tenancy, and even then the landlord's liability was confined to the amount of the deficiency of the sale. Such proceedings were a condition precedent to the existence of the landlord's liability. If a sale has become impossible, the landlord cannot be liable for the deficiency in the sale.

The defendant received no personal advantage from the advance which was made before he became landlord. There must be clear words to create personal liability. The cases under the Drainage and Improvement Codes are analogous, in which it was held that the liability ceased on the cesser of the security on which the rentcharge was charged: *Attorney-General* v. *Ireland* (1); *Attorney-General* v. *Wilson* (2); *Commissioners of Public Works* v. *Symes* (3); *Attorney-General* v. *Fetherstonhaugh* (4).

Ronan, K.C., *Falconer, K.C.*, and *De Renzy*, for the respondents:—

The decisions under the Drainage and Improvement Codes do not apply. The advances there were made on the security of certain estates in the land, and the only subject-matter was the estate of the owner. But if that estate terminated, there was no power to fix the liability upon the estate in remainder, or any personal liability on the owner. The advance was made to the tenant alone. Here the advance was made on the joint application of landlord and tenant, and was paid to the landlord. The case has been twice decided already in favour of the plaintiffs in *Irish Land Commission* v. *Scannel* (5), and *Irish Land Commission* v. *O'Connell* (unreported (6)).

(1) 15 L. R. Ir. 145.
(2) 31 L. R. Ir. 28.
(3) 32 L. R. Ir. 598.
(4) 32 L. R. Ir. 614.
(5) 30 L. R. Ir. 287.
(6) *Irish Land Commission* v. *Sir Maurice J. O'Connell.* Judgment delivered at the Assizes at Tralee, 13th July, 1894, by HOLMES, J.:—

As I have already intimated, the process in its present form cannot be sustained. It seems to me to be based upon a fallacy which has run through the

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The definition of holding in the Land Law Act, 1881, is brought into the Arrears Act by sect. 1, which provides for "any holding to which the Land Law Act, 1881, applies." "Holding" during the continuance of a tenancy means a parcel of land held by a tenant of a landlord, and upon the determination of such tenancy means the same parcel of land discharged from the tenancy. The holding is charged with a rentcharge: that charges the landlord's interest and the tenant's, and if default is made the Land Commission may sue either one or the other. That means the tenant who is there at the time; but if he is evicted, that does not do away with the remedy. If the contention of the defendant's counsel is right, then if the landlord evicted the farm for non-payment of rent, and re-let it to a new tenant, or even to the old tenant, he could get rid of the whole liability. The section is a sort of application of the doctrine of *Thomas* v. *Sylvester* (1); the *pernor* must pay, not because he was bound by the covenant, but because he was in possession: *Swift* v. *Kelly* (2).

arguments. I am clearly of opinion that the principal sum is not at the present time due, and therefore if I were to take the civil bill in its existing form, I could not make a decree on it in favour of the plaintiffs; but I do hold that the instalments are a charge upon the land, and can be recovered from the defendant; that he is liable to pay them, and can be sued for them. I have, however, a grave and serious doubt as to whether he can be sued for any, except instalments that have accrued during the past two years; in fact, if I were obliged to decide that question upon the consideration which, up to the present I have given it, I would be of opinion he could not be sued for any previous instalments. Having come to the conclusion that he is liable for these two years' instalments, to that extent I am prepared to amend the process, and, Mr. Wade, on behalf of the Land Commission, having assented, I amend it by confining the civil bill to the two years' instalments of 17*s.* 6*d.*, each due on 1st January, 1893, and 1st January, 1894. Treating the process in that form, I am prepared to give a decree to the Land Commission for that amount. Now, the ground upon which I have come to that conclusion is this —This 16th section of the Arrears Act, 1882, is somewhat curiously framed. It seems to be framed upon the basis that there would be always a tenant in occupation of the holding, and that there was no possibility of the landlord, after the advance, taking possession of the premises, either by accepting a surrender from the tenant, or by ejecting him on notice to quit, or, as in this case, for non-payment of rent. This is a peculiarity of the section, and there-

(1) L. R. 8 Q. B. 368. (2) 24 L. R. Ir. 478.

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June 29.

LORD ASHBOURNE, C.:—

This is an appeal from the King's Bench Division, which following a circuit decision of Lord Justice Holmes, without expressing any opinion of its own, left the landlord free, if dissatisfied to bring the case before this Court on appeal.

It is a case stated by Mr. Justice Madden on a hearing of a civil bill appeal to recover the sum of £5 6*s.* representing four half-yearly instalments of two rentcharges charged by two orders of the Land Commission made under the Arrears of Rent (Ireland) Act, 1882.

These charges consist of rentcharges for thirty-five years on the holdings of Carricknagower and Ballyfolane, both then in the hands of a tenant John Quinn, and part of the estate now the fee of the defendant. It is claimed that the instalments are continuing ones, and that in fact they will continue on the parcels of land representing Quinn's holding until the year 1918.

The facts of the case are simple and are interesting as they

fore I must read with a considerable amount of care its various provisions. I am of opinion that what is meant by the holding in the section is the parcel of land—the parcel of land in the hands of the tenant as long as he is there, and when the tenancy has been extinguished, the parcel of land in the occupation of the landlord. We, therefore, have in this section a declaration that there is to be a rentcharge payable half-yearly out of this parcel of land. The rest of the section is based upon the idea that the tenant is to continue in possession, and it declares that as long as the tenant is there he is the person that is to pay, and machinery is provided by which the amount is to be recovered from him, and as long as the tenancy is outstanding there is no direct liability attaching to the landlord. Then, after the tenant has made default, the entire residue of the charge is made payable by the tenant. The Land Commission may sell the tenancy, and if there be any surplus unpaid after applying the proceeds of the sale of the tenancy, it is to be paid by the landlord. It is quite clear this portion of the section and all the remainder of the section beyond the first clause only deal with the case of a tenant being in occupation of a holding, whether the tenant has made default or not, and it does not contemplate in any way the dispossession of the tenant by the landlord. These clauses in no way apply to the case before me. What occurred here was that before the tenant had made twelve months' default he was ejected by the landlord, and the latter obtained possession of the entire holding. I, therefore, reject that part of the section as not applicable to the case before me. I find the land in the hands of the landlord charged with a rentcharge, and I hold that the law

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raise a question involving the effect of a charge under the Arrears of Rent (Ireland) Act, 1882, on the landlord's interest in a holding affected by that charge.

Mr. Scott Moore was trustee of an estate including these two townlands held upon trust, under her father's will dated 8th August, 1848, for his wife for life with remainder if she should so appoint to their son the appellant in fee. She executed the power of appointment in favour of the appellant on 3rd July, 1875. John Quinn was tenant of these townlands, and he and J. Scott Moore applied under the Act of 1882 for advances. They were duly made, one amounting to £45, and the other to £8, and these were secured by charging orders dated 29th September, 1882.

William Lynch, on Quinn's death in 1886, became his successor in the tenancy, and the appellant, on his mother's death, under the appointment aforesaid became owner in fee, and he in April, 1897, evicted the tenancy for nonpayment of rent. The appellant entered into possession of the parcel of land comprising the holding, and retained possession of part, and let the rest to a man called Kearns.

Having regard to these facts, can the appellant on the con-

enables the amount so charged to be recovered. Up to this point the County Court Judge agrees with the view I take. He commences his judgment by stating that he is clear the term "holding" has the meaning which I have given it; but he seems to think this action cannot be brought against the landlord. Under 45 & 46 Vict. proceedings are to be taken by the poor-rate collector, and there is to be a warrant sent down to him showing how much each tenant is liable to pay, and he is to proceed against the tenant. That part of the section based upon the idea the tenant was in occupation of the premises has been repealed, and there is provided in substitution that the rentcharge can be recovered in the same way as tithe rentcharge is recoverable, including, of course, by civil bill, against the person entitled to the estate upon which it is charged. There is the point where I part company from the County Court Judge. He appears to think no action can be brought against the person who holds the land liable to pay the rentcharge. Undoubtedly there is no privity of contract, but the learned County Court Judge appears to overlook the fact that in a certain class of case privity of contract is not required where there is privity of estate, and that the rentcharge can be recovered from the person who is owner, and entitled to the estate, by common law action not based upon privity of contract but privity of estate. Suppose it were tithe rentcharge that

struction of the Arrears of Rent Act, 1882, be made liable for the instalments claimed in the civil bill?

The Arrears of Rent Act, 1882, in the case of holdings valued at not more than £50, enables an advance to be made to the landlords by way of loan, and this is the provision which applies to the present case. The 16th section of the Act which is of the highest importance contains the following words:—[The Lord Chancellor read the section]. It is worthy of note that this provision was substituted for section 59 of the Land Act of 1881, which provided that there should be a similar advance also on the joint application of the landlord and tenant, repayable by a rentcharge for fifteen years which should be repaid by the landlord for the time being, the amount being added to the tenant's rent, and recoverable therewith.

It is also always to be borne in mind that the application to the Land Commission under the 16th section is to be the joint application of the landlord and the tenant, and that the landlord is the person for the time being entitled to receive the rents and profits of the holding which after the determination of the tenancy is defined as the same parcel of land discharged from the tenancy. One would *prima facie* say that, if the tenant failed or disappeared,

was due, the person that would be defendant in the process would be the person entitled to the estate charged with it. Here the defendant is the person who is owner of the holding liable to the charge. I gathered from the way Mr. Sandford argued the case that he felt he could not support the view taken by the County Court Judge on this point. I hold that the rentcharge, as it falls due in each half-year, is recoverable from Sir Maurice O'Connell, who is at present owner and in occupation of the lands out of which it is to be paid. But then comes the question of the period of limitation, which I don't intend to discuss very fully—this may be a question of very general importance. The impression upon my mind is that the limitation of two years, to be found in the Act of 1870, is applicable to this rentcharge, and it can only be sued for within two years; but before I would decide this point I would require a considerable amount of time to consider it. I could not do it upon circuit, and I should be obliged to reserve it until my return to town. Amending the process as I have done, I am not precluding the Land Commission from raising this question at another time. As far as I am concerned I amend the process by confining it to two years instalments of rentcharge, amounting to 17*s.* 6*d.* each year, due on 1st January, 1893, and 1st January, 1894, and in that form I give a decree for £1 15*s.*, with 4*s.* 9*d.* costs below, and £1 17*s.* 6*d.* costs of appeal.

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the holding or parcel of land in the landlord's hands would remain liable to the instalments, and it would not appear very unjust, the landlord having joined in the application and received the money.

Is this *prima facie* view affected by the machinery provided by the Act for the recovery of the instalments, or by the title or estate of the landlord? Under the Act of 1882 the rentcharge was to be collected from the tenant as poor rate, and if he made default in any half-yearly instalment for twelve months the instalments and entire residue of charge as a consolidated sum become payable by him and raisable by a sale of his tenancy, and if the proceeds prove deficient "the amount of the deficiency shall be paid by the landlord of the said holding, and shall be a charge upon his estate and interest therein, and shall be collected and levied in the prescribed manner."

This liability for the consolidated sum is not the remedy now adopted, and I need not specially consider its necessary conditions, or whether the landlord's estate could be made liable by reason of his having made a sale impossible.

This remedy for the consolidated liability is not I think inconsistent with the liability for the half-yearly gales under the charge imposed on the holding or the parcel of land composing it. Would it be just that the landlord could hold the parcel of land free from the annuity which he by joining in the application for his own benefit imposed on it? Does the holding after he has evicted the tenant's interest cease when in his hands to be a parcel of land liable to the instalments?

I cannot see why because there may be other remedies against the tenant, when in the holding, the liabilities of the landlord for the accruing instalment, when the holding comes to his hands, should not be recognised. Under section 59 of the Irish Land Act of 1881, the landlord for the time being is expressly liable for the payment of the rentcharge. Why, under this substituted clause, sect. 16 of the Act of 1882, should it be claimed that he had no such liability, when he had evicted the tenant and taken possession of the parcel of land comprised in the holding? The rentcharge was clearly in the first instance charged on the holding, and I see nothing to exclude the landlord's liability. The appellant, how-

ever, strongly argues that the charge ended with the termination of the tenant's interest by ejectment for non-payment of rent, and also that the present landlord, by the dropping of the tenant for life's estate, is now free from all liability in this connection.

Strong reliance was placed on the decision of this Court in *The Attorney-General* v. *Ireland* (1) and *The Attorney-General* v. *Wilson* (2), and other cases on the drainage code. That legislation is entirely different, and, in my opinion, raises very distinct considerations. In the Drainage Acts the word "lands" could mean either the parcel of land or the estates or interest in the lands, and there were some clauses which appeared to support the contention for the Crown, that the charge attached to the reversion on the limited interest; but any such words were held to be controlled by section 7, the application for the loan, section 11, and the sale sections under which the sale is to be made to the purchaser subject to rent issuing out of the lands.

The question whether it makes any difference that the appellant claims as a purchaser under a will does not expressly arise in this case, as it was J. Scott Moore the trustee of the whole estate who applied for and obtained the advance. But I am disposed to think that under the definitions of "holding" and "landlord," and the frame of the Act, the charge would attach on the appellant, the landlord in possesion, and that the landlord who also applied for and got the advance would be treated for the purposes of this Act as representing all interests in the estate. The question involved in the appeal was, as already pointed out, considered and decided by Lord Justice Holmes in the two cases on circuit referred to, and, in my opinion, the full argument and consideration which the case has received on this appeal have fully established that his decisions were right. I concur in his conclusion in *O'Connell's Case* (3)—that what is meant by the holding in the section is the parcel of land—the parcel of land in the hands of the tenant as long as he is there, and when the tenancy is extinguished, the parcel of land in the occupation of the landlord—that the section having declared that there is to be a rentcharge payable half-yearly out of the parcel of land, then only deals with

(1) 15 L. R. Ir. 145. (2) 31 L. R. Ir. 28. (3) *Ante*, p. 29, note.

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the case of a tenant being in occupation of a holding, whether he has made default or not, and does not contemplate the dispossession of the tenant by the landlord; but, nevertheless, when dispossession by the landlord takes place, the parcel of land remains liable to the payment of the rentcharge which can then be recovered from the landlord.

For these reasons I think that the questions should be answered in favour of the plaintiffs.

FITZ GIBBON, L.J.:—

The question, as stated by Madden, J., is in these general terms:—"Is the defendant liable to pay to the plaintiff the sum of £5 6*s.* claimed by the civil bill"? This sum consists of two years rentcharge, ending January 1, 1899, claimed by the Land Commission to issue for thirty-five years from July 1, 1883, out of the lands of Carricknagower, in repayment of advances made to the landlord upon charging orders dated January 1, 1884, under the Arrears of Rent Act, 1882. These advances were made in respect of one year's rent of two holdings in arrear before 1881. The question must be decided upon the effect of the Arrears Act, 1882, sect. 16, as applied to the facts of the particular case, but those facts must be stated.

In our decision we must have regard to the decisions upon statutes *in pari materia*, and also to two decisions of Holmes, L.J., upon the Arrears Act, 1882, itself. We cannot get rid of the decisions on other statutes, either by describing the Arrears Act, 1882, as *sui generis*, or by asserting that the other Acts are so dissimilar that decisions upon them give us no help, until we have ascertained how far the statutes resemble each other, and how far the previous judgments apply to the Act of 1882.

We have been referred to decisions—1, On the Acts enabling advances to be made to tenants, with or without the concurrence of their landlords, for the improvement of land: in *Attorney-General* v. *Ireland* (1), in which this Court reversed the Vice-Chancellor in 1884; *Commissioners of Public Works* v. *Symes* (2), in

(1) 15 L. R. Ir. 145. (2) Exch. 28 L. R. Ir. 496; on appeal, 32 L. R. Ir. 598.

which this Court reversed the Exchequer in 1892; and in *Attorney-General* v. *Fetherston* (1), in which this Court reversed the Queen's Bench in 1892, and upheld the dissenting judgment of Gibson, J.;—2, Under the Drainage Acts, in *Attorney-General* v. *Wilson* (2), in which this Court in 1891 reversed the Vice-Chancellor, who had distinguished the effect of the Drainage Code from that of the Improvement Code; 3, The decision of Judge Shaw in *Irish Land Commission* v. *Clifford* (3), and the decision of Judge Kane in the present case.

The Seeds Loans Acts and the Suck Drainage Act are other instances of legislation securing repayment of advances by rentcharges, which have been considered here, so that this is a case of very wide application.

In every case, up to this, upon the effect of ejectment for non-payment of rent in determining a rentcharge created to secure an advance to or for the benefit of a tenant, this Court has held that the rentcharge did not survive the interest of the tenant, though the Courts of first instance had been of the contrary opinion. The existence of the same relation between the parties, and the similarity in character of the advances, make these cases *in pari materia* with the present, and the same conclusion ought to be reached here, unless there is some vital difference either in the facts of the particular case, or in the words of the Arrears Act, 1882. It rests on the plaintiffs to show that distinction, and to do so all the more clearly because the present defendant got no benefit from the advance here, and even his land derived no benefit from it, such as is presumably derived from advances for drainage and improvement. But first, what are the facts?

I cannot find in the case stated by Madden, J., the materials for avoiding questions which my colleagues consider themselves at liberty to reserve, upon assumptions as to the title of the present defendant, Fletcher Moore. These questions are not suggested in the case, they were not discussed in argument, and we have not the advantage of knowing the opinion of the King's Bench upon them.

(1) Q. B. 30 L. R. Ir. 585; on appeal, 32 L. R. Ir. 614.
(2) 31 L. R. Ir. 28.
(3) 26 I. L. T. R. 75.

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The order under appeal is unprecedented: it is in these terms:—

> "The Court, having regard to the decision in the case of *I. L. C.* v. *Scannel* (30 L. R. I. 287), deems it right to follow that decision, and accordingly declares that the defendant is liable for the said sum of £5 6*s*., the plaintiffs undertaking to pay the defendant's costs of appeal in the Court of Appeal as well as in this Court, in any event."

Scannel's Case (1) was a Circuit decision of a Judge of the High Court. The power exercised by Madden, J., in stating this case, was intended to enable Circuit Judges to have difficult or important questions decided by the High Court. That power is often exercised where Circuit decisions conflict, or where one Circuit Judge is not prepared to follow the previous decision of another; but this is the first instance in which the High Court has sent such a case on to this Court without deciding it, or in which a plaintiff has had to pay the costs of a special case in two Courts in any event, in order to get a decision in one.

Even if *Scannel's Case* (1) had governed the present case, the additional costs of the appeal could not have been justly thrown on the plaintiffs, if the King's Bench had been willing to follow it. We do not know what the King's Bench thought of it; but *Scannel's Case* (1), as a decision, did not rule this case at all. Holmes, J., decided in Scannel's favour, and held that the rentcharge could not be recovered from him. He not only dismissed the action, but he further held that neither in it nor in any other action could the rentcharge be recovered from Scannel, because he was a purchaser from the Land Commission without notice of the rentcharge. The judgment no doubt contains an *obiter dictum*, "that the only possible inference from the Arrears Act, 1882, sect. 16, is that in the event of the landlord becoming entitled *to the holding* freed from the interest of the tenant therein, there is transferred to the estate in which the tenancy *has merged*, and to its owner, the liability that previously attached to the tenancy and to the tenant."

This *dictum* does not apply to the case of *the holding* passing to the landlord; it relates to the case of *merger* only, and the case stated

(1) 30 L. R. Ir. 287.

here bases the present claim on *merger*. I must presently point out that Fletcher Moore acquired nothing by *merger*, and therefore that this *dictum*, right or wrong, does not apply here.

Holmes, J., did decide—again on Circuit, but three years afterwards, in *I. L. C.* v. *O'Connell* (1), of which an unofficial report has been given to us—a point much nearer to that now at issue, but that case differed from the present in the important fact that the defendant who was held liable had himself received the advance.

This case was argued on the assumption that the advance was made to the defendant's mother, a tenant for life. My colleagues consider themselves entitled, on the documents, to hold that it was made, not to Mrs. Moore, but to her husband as the legal owner of the fee. What the case states is as follows:—

> "The said lands are vested in trustees, one of whom was Joseph Scott Moore, whose wife was tenant for life of said lands, with power of appointment. On her death on September 12, 1886, the defendant (Fletcher Moore), the son of the said John S. Moore and his said wife, *became seized of the said lands in fee simple* under said settlement and appointment."

I read this as a statement that the lands were vested in trustees for the tenant for life, with an executed use in remainder to the defendant as appointee in fee. If so, his estate is derived, not from or through either the trustees or the appointor, but from the settlor. Mr. Dudley White concluded his reply by asking what liability his client could be under if he was an owner by title paramount, a position which the production of further evidence has proved him to hold. Yet my colleagues assume him to be a successor in estate of Joseph Scott Moore, or to claim through him, and they hold him liable because his father, one of two trustees, in 1883, obtained the advance for the tenant for life, in discharge of arrears of rent then due to her.

Since the argument, the Lord Chancellor called for the settlement and appointment, which will now be read on our order. The settlement is the will of Thomas Brown, confirmed by "The

(1) *Ante*, p. 29, note (6).

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Moore Estates Act, 1853." The settled property was money, to be invested in the purchase of fee-simple lands, to be held by trustees upon trust to pay the income to the testator's daughter, Elizabeth Moore, for her separate use during her life, "she to have no estate or interest which could or might be sold, assigned, *mortgaged*, or alienated by her, in any respect whatever." After her death the property, described as "belonging to the children," to which they were to "then become entitled in possession," was to "vest" in her children on attaining twenty-one, as she should appoint. The Act recited that there were two children, the defendant Fletcher Moore, the only son, then seventeen years old, and a daughter who died before the appointment. It provided that the trust funds should be invested in the purchase of lands, including Carricknagower, "to vest as provided by the will." The appointment was made by Mrs. Moore, by a deed of July 3, 1875, appointing the lands to Fletcher Moore immediately after her decease, and declaring that *the two trustees* should stand seized of the fee and inheritance, *habendum* "in trust for Fletcher Moore and his heirs for ever." Unless we ignore the Statute of Uses, he became the absolute legal owner in fee-simple when his mother died, claiming by title paramount both against her, and against her trustees.

On the Arrears Act, 1882, I assume, for the present, that if a landlord, as defined by the Act, obtains an advance, he is liable to pay the rentcharge so long as he has any estate in the land which either he or the tenant had at the date of the advance. But the foundation of this assumption is the provision in sect. 6 (8), that, in a certain event, the amount of a certain

> "deficiency shall be paid by *the landlord of the holding*, and shall be a charge upon *his estate and interest therein*, and shall be collected and levied in the prescribed manner."

We have now nothing to do with this clause, because the "deficiency" is a deficiency in the proceeds of the sale of the tenancy, and here the tenancy was never sold; it was determined by eviction for non-payment of rent, and the case finds that no proceeding to sell it, or to recover the "deficiency," was ever taken. But if the clause had been acted on, what would have been thereby

charged with the deficiency? Only the landlord's estate and interest in *the holding*.

Until the Act of 1896, a tenancy created by a tenant for life could not bind a remainderman until he accepted the tenant. Even now, nothing more than the estate and interest of the tenant for life who got the advance can be charged, unless "landlord" means "landlord for the time being." Fletcher Moore is no longer "landlord," in any sense, of the part of the former "holding" which is now in his own possession and occupation as owner in fee, while *Clifford's Case* (1) decides that the tenancy of the part let to a new tenant since the eviction is not charged.

Upon the whole Act, I am satisfied that its object was to relieve tenants from arrears due to their then landlords, with the aid of advances not exceeding one year's arrears. This advance was charged primarily in each case upon the existing tenancy, and next, but only to the extent of any deficiency which might arise on sale of the tenancy, upon the estate and interest in the holding, *i.e.* upon the continuing reversion of the landlord who got the money. When the tenant made default, sect. 16 (2) enacts that

> "in every such case the entire of the unpaid residue, with interest, shall forthwith be payable *by the tenant*, and the amount thereof shall be raised by sale of the tenancy."

The default of the tenant ended the rentcharge accelerated the repayment of the advance by creating, instead of the rentcharge, a capital charge upon the tenancy of the whole amount due. The tenancy was at once to be sold, and any deficiency became chargeable on the borrowing landlord's continuing reversion *in the holding*. "*Therein*" is the word of the Act. The holding passed to the purchaser free from any charge, but the landlord remained entitled to the rent. This is a complete, consistent, and just scheme of legislation, and I cannot conceive that the Legislature can have intended that the Land Commission should have an option to let the rentcharge run on, to allow the tenant to forfeit the holding by non-payment of the rent, to omit to redeem or to sell the tenancy, and then to hold the reversioner liable to pay

(1) 26 I. L. T. R. 75.

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the rentcharge for thirty-five years, whether he had got the advance or not, and even when he afterwards acquired his interest by title paramount to both the parties to the original advance.

It is noteworthy that the Arrears Act, 1882, contains a definition of "landlord" peculiar to itself, which differs from the definition in the Land Law Acts by omitting to include successors in estate.

> "Sect. 9. The expression 'landlord,' *in relation to a holding, means* for the purposes of this Act any person for the time being entitled to receive the rents and profits *of such holding.*"

This definition is consistent with my construction of the Act, and strengthens my view that the continuance of the holding, and the continued receipt of the tenant's rent, are assumed wherever the "deficiency" is made payable by the landlord; also that the borrowing landlord only is made liable, and that the rentcharge can never survive the tenancy on which it was primarily charged.

Fletcher Moore recovered the actual possession of the land upon forfeiture of the tenancy, he afterwards re-let part of it to a new tenant, who seems to me to stand in the same position as Scannel, and it is not alleged that he is liable to any part of the rentcharge.

The argument for the plaintiffs rests almost entirely upon the use made of the definition of "holding" in the Land Act of 1881, which is incorporated in the Act of 1882, by sect. 12. "Holding means a parcel of land held under a contract of tenancy; and, upon the determination of the tenancy, means the same parcel of land discharged from the tenancy." The object of the second clause of this definition was pointed out by Mr. Butt, and it has been also mentioned in many cases. "Holding" is frequently used in the Act, especially with reference to the tenant's right of compensation, as describing the land after the determination of the tenancy, and the gloss was therefore necessary to give effect to the Act. But it is now for the first time contended that the incorporation of this definition brings the fee and inheritance of the land under the operation of the Act of 1882, and that in a case where the estate in possession of the defendant never belonged to the landlord who was originally covered by the definition. This

extension of the words brings under the operation of the Act estates not of the landlord, but estates by title paramount; by ignoring the occurrence of the controlling word "landlord" in the definition itself, it begs the question now at issue, because it assumes that Fletcher Moore is the "landlord," though the question is whether that term in the definition applies to an owner who, after the determination of the tenancy, becomes entitled to the possession, discharged both of the tenancy and of "the estate and interest therein" of the landlord to whom the advance was made.

Furthermore, it is inconsistent with the Chief Baron's interpretation of the definition in *Ex parte Hutchinson* (1), where he says:—"The words 'a parcel of' which precede 'land,' point to a meaning of the word 'land' in that definition different from that in the Act of 1860. 'Parcel of land' in that definition means *the soil*, the corporeal hereditament in the particular parcel." Therefore it does not mean any particular estate; far less can it mean the fee and inheritance.

The strongest words for the plaintiffs which the definition of "holding" can supply to bring Fletcher Moore's estate under the rentcharge, are the words "parcel of land," and the decisions of this Court upon the other Acts appear conclusive that these words are not sufficient. In the Drainage and Improvement Acts, the subject-matter of charge is described by the word "*land*" or "*lands*." Unless the fee is brought in by prefixing "parcel of" to "land"—which is impossible—these decisions rule that "land" will not charge any estate or interest except that of a person otherwise bound by the transaction.

Under the Drainage and Improvement Acts, landlords recovering possession of their land by eviction for non-payment of rent, even where those very landlords had been so at the dates of the advances, have been held by this Court to be discharged of the rentcharges, even in the case of fee-farm tenures, and although the money had been spent upon the very lands of which the landlords had taken possession. If I were to quote from the affirmed judgment of Gibson, J., in *Fetherston's Case* (2), and

(1) 12 L. R. Ir. 87. (2) 30 L. R. Ir. 585.

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from the judgments of this Court in all the cases, unless I read them *in extenso* I could not sufficiently demonstrate how completely and how directly they apply to this case. And here the rentcharge was a security only for the repayment of what was the personal debt of the occupier to a tenant for life of the reversion, and the present defendant got no benefit whatsoever from the advance. No single point has been specified in which in language, or in object, in policy or in subject-matter, the Drainage or the Improvement Acts differ from the Arrears Act, except in—1, the definition of "holding," with which I have already dealt; and in—2, the express charge of the "deficiency" on "the estate or interest of the landlord" of the holding after the sale, which has not happened here. *Attorney-General* v. *Ireland* (1) was decided mainly on the ground that the power of sale there did not cover the estate of a landlord recovering possession on forfeiture of a tenancy. Here, the power of sale covers the landlord's estate *in the holding* only. Thus the argument is thrown back by *Ireland's Case* (1) upon the definition of "holding," and that becomes the only foundation for the plaintiffs' claim.

But I go back to the Act of 1882, and in it I find both a general scope, and also particular provisions, indicating a restriction of the rentcharge to the tenancy, and to the estate of the landlord "*therein*," *i. e.* to the interest of the parties to the advance—more clear than anything found in the Drainage or Improvement Acts. The general scope of the Act, seen in sections 1 and 16, was to help tenants "unable to discharge antecedent arrears without loss of their holdings," by giving them a grant in aid from public funds, and enabling them, with the concurrence of their then landlords, to obtain further aid from money raised on the security of a rentcharge, not upon the fee which might have been charged in a few words if that were meant, but only upon the "holding" and the estate and interest of the landlord *of the holding therein.*

The Drainage and Improvements Acts charged the "land," and defined the priority of the rentcharges created under them

(1) 15 L. R. Ir. 145.

by words so wide as to lead the Courts below to charge the fee, and to cause great difficulty in this Court in relieving the landlord's estate when he recovered the possession by eviction for non-payment of rent. That difficulty was overcome with the aid of the power of sale, and of considerations of the injustice of charging one man's property with the debt of another.

I cannot get over sect. 16 (2) of the Arrears Act, which declares that the rentcharge securing the advance "shall have priority over all charges affecting *the holding*, except quit-rent and Crown-rent" (which affect the fee), "*and sums payable to the Commissioners of Public Works, and shall be payable by the tenant of the holding for the time being.*"

The tenant's holding here, or any other holding charged under the Arrears Act, may have been subject to "sums payable to the Commissioners of Public Works" under the Drainage and Improvement Acts.

How can a decision that a rentcharge to secure an advance for arrears affects the fee be reconciled with the repeated decisions of this Court, that rentcharges payable to the Commissioners of Public Works for drainage or improvement advances, obtained by the same tenant and, by the Act of 1882, taking priority of the arrears rentcharge, do not affect the fee at all?

Furthermore, sect. 16 applies only to "such holdings" as were already chargeable under the Land Act, 1881, sect. 59, with the repayment of advances cancelled under sect. 15. Sect. 16 applies only to "such holdings."

But the Act of 1881, sect. 59, had created rentcharges for fifteen years only, which were "payable *by the landlord*," and were recoverable from the tenant as so much additional rent. These were cancelled, and in their place sect. 16 created rentcharges "payable *by the tenant*," which were to be "levied and collected in manner thereinafter provided." The manner of levying and collecting them now in force must be traced through a series of Acts. The portion of sect. 16 which made them leviable as if they were poor-rate, could be put in force against the occupier only. This was repealed by the Public Works

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Loans Act of 1883, sect. 11 (2), which made these rentcharges recoverable "in the same manner as advances to tenants for the purchase of their holdings under the Act of 1881, sect. 28," and the Act of 1881 enacted that these "shall be secured as provided by the Landlord and Tenant Act, 1870, part 3." Section 49 of that Act provides that they shall be recoverable "in the manner in which tithes are recoverable in Ireland."

Tithes are recoverable under 1 & 2 Vict. c. 109, sections 27 and 28.

Thus the civil bill in the present case is brought under a statute which, by reference, enacts that this rentcharge shall be levied and recovered in the same manner as annuities payable by purchasing tenants, which from their nature could never, under any circumstances, be recoverable from a landlord.

It is further to be observed that the civil bill is only one of several remedies. An alternative remedy, given by the same section, is "distress." Therefore any argument founded upon that section must go the length of holding that, notwithstanding the judgment of Holmes, J., Scannel's cattle might have been distrained for the rentcharge for which he expressly held that Scannel could not be made liable in any form of action whatsoever. It must also be held that the present tenant of the portion of the lands which Fletcher Moore let to a new tenant after the eviction of Quinn's tenancy, is now liable to distress, and if the whole had been relet, or had been sold, every occupier must have been equally liable to distress.

One other argument requires an answer. The *dictum* in *Scannel's Case* (1) was rested on "*merger*." Neither merger nor surrender can destroy charges or rights of third parties, existing against the merged or surrendered interest. But this is so because the particular estate, though determined at law, survives and passes to the superior owner, in equity. But Fletcher Moore took nothing by either merger or surrender. He acquired the possession by forfeiture of the tenancy, and by paramount title.

Lastly, in my view of the matter, the Land Commission had its remedy, but it forewent it. When the holding became liable

(1) 30 L. R. Ir. 287.

to eviction for non-payment of rent, the rentcharge, and the power of sale under the Act of 1882, gave the Land Commission a specific interest under which it could have redeemed, could have sold the tenancy, and could have applied the purchase-money towards the discharge of the advance, provided the tenancy bound Fletcher Moore. If the estate of the landlord who got the advance had been still in existence, any deficiency could have been charged against it. The case finds that no proceeding of this kind was taken. I hold that the rentcharge itself ended with the tenancy on which it was charged; and that, unless and until some proceeding was taken against that tenancy, no estate, even of the original landlord, could be charged. But these considerations cannot be entertained upon a case stated upon the question whether the fee is liable, and will, until 1918 continue to be liable, to pay a still subsisting rentcharge, accruing *de die in diem*.

The real action against a *pernor* has been relied on to supply a foundation by analogy for this civil bill, but no such action lay except against a privy in estate, and the facts now proved show that there was no such privity between Fletcher Moore and any of the parties to the advance for the repayment of which this rentcharge was created.

For these reasons I am clearly of opinion that the dismissal of this action by Judge Kane was right, and that the question on the case should be answered in the negative. In accordance with the order of the King's Bench, the Land Commission must, in any event, pay the costs in that Court and here.

WALKER, L.J.:—

I concur with the Lord Chancellor. The civil bill is one to recover the sum of £5 6*s*., representing four half-yearly instalments of two rentcharges—one of £1 2*s*. 6*d*. half-yearly, and the other 4*s*. half-yearly, charged by two orders of the Land Commission, dated 29th September, 1883, made under the Arrears of Rent (Ireland) Act, 1882. These charges consist of rentcharges for thirty-five years on the holding of Carricknagower, containing 101A. 3R. 24P., and Ballyfolane, containing 38A. 1R. 8P., both then in the hands of a tenant John Quinn, and part of the estate now the fee of the defendant.

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The instalments are claimed as ones continuing, and which in fact, if unpaid, must continue on the parcels of land representing those holdings until the year 1918.

If such charges subsist, the remedy is the appropriate one by virtue of the provisions of the 11th section of the Public Works Loans Act, 1883, and the sections therein incorporated, including the 27th section of the 1 & 2 Vict. c. 109.

The case involves an important and somewhat difficult question as to the effect of a charge under the Arrears of Rent (Ireland) Act, 1882, on the interest of a landlord in a holding alleged to be affected by that charge. The facts are simple enough. J. Scott Moore was trustee of an estate which included the townlands of Carricknagower and Ballyfolane held upon trust for his wife, the mother of the appellant, for life, with remainder to the appellant in fee. John Quinn was tenant of the portions of these townlands in question; and he and J. Scott Moore applied under the Act of 1882 for advances. They were made in the one case of £45, and in the other of £8, and the advances were secured by two charging orders of 29th September, 1883, by the one of which the holding of Carricknagower was charged with an annuity of £1 2*s.* 6*d.* half-yearly for thirty-five years, and that of Ballyfolane with an annuity for the like term of 4*s.* half-yearly.

John Quinn died, and William Lynch became his successor in the tenancy. Mrs. Moore, the equitable tenant for life, also died in 1886, and the appellant became owner in fee in possession, and he in April, 1897, evicted the tenancy for non-payment of rent. The appellant let part of the holdings, the exact area or locality of which does not appear from the case, to a person named Kearns, and retained possession of the rest. The question entirely depends on the true construction of the Arrears of Rent Act, 1882. The provision in this Act took the place of a somewhat analogous provision in the 59th section of the Land Act of 1881, under which in the case of holdings, and subject to conditions therein mentioned, an advance in lieu of arrears of rent might, on the joint application of landlord and tenant, be made to the landlord, not exceeding one year's rent, and half the antecedent arrears; and the security is to be a charge on the holding of a rentcharge payable half-yearly during fifteen years at the rate of £8 10*s.* per

cent., and this rentcharge is made payable by the landlord for the time being of the holding," and each half-yearly gale of it is deemed to be an addition to the half-year's rent of the holding, and may be recovered as such by the landlord. It is obvious to my mind that questions somewhat similar to those in the present case might have arisen under that section, but it has not received judicial construction.

The Arrears of Rent Act, 1882, in the case of holdings valued at not more than £30, enables a free gift in the cases specified to be made to the landlord in lieu of arrears to the amount mentioned —a provision which I need not further refer to; but in the case of holdings valued at not more than £50, it enables an advance to be made to the landlord by way of loan, and this is the provision which applies to the present case. The 16th section of the Act is in the following terms:—[The Lord Justice read the section.]

In order to properly apply that enactment to the facts of the present case we must expand the words "holding" and "landlord" by their definitions, and the "holding" becomes, during the tenancy, a parcel of land held by the tenant from the landlord, and after the determination of the tenancy the same parcel of land discharged from the tenancy, and the word "landlord" is the person for the time being entitled to receive the rents and profits of the holding, and the priority declared has reference more aptly to the landlord's interest than the tenant's in such a small holding. If there were nothing else in the case it would, I think, be clear that there is a rentcharge fixed for thirty-five years on that parcel of land, the liability for which is cast upon the tenant in the first instance, but when he disappears the same parcel must bear it in the landlord's hands, and the real question which we have to determine seems to be whether that is altered by the provisions for working out against the tenant the primary liability, which are contained in the Act.

The Act of 1882 directs that the rentcharge should be collected from him as poor-rate, and if he made default in payment of any half-yearly instalment for twelve months, the instalments and entire unpaid residue of charge as a consolidated sum became payable by him and raisable by a sale of his tenancy in the County Court, and if the proceeds failed to produce the consolidated

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liability it is provided that "the amount of the deficiency shall be paid by the landlord of the said holding, and shall be a charge upon his estate and interest therein, and shall be collected and levied in the prescribed manner." The rules of June 1, 1892, prescribe as the mode a personal action, or a proceeding for sale or receiver. The same portion of the section makes the consolidated liability payable out of any purchase-money arising from the transfer of the tenant's interest by sale. This special liability for the consolidated sum is not the remedy which is being pursued here, and if it were, a serious question would arise whether it could exist till the sale had been first had, or whether the landlord's estate and interest in the holding could be made liable by reason of his having made, by his own act, a sale impossible. I express no opinion on that question. This remedy against the tenancy for the consolidated liability seems to me one which may well co-exist with the liability for the half-yearly gales under the charge imposed on the parcel of land, which *prima facie* flows from the original imposition of the charge, and I do not think it is done away with by the special and contingent remedy given for the consolidated liability in the special case mentioned. I may assume, for the purposes of my judgment, that the special remedy does not exist in this case for the special liability, but it does not follow that the landlord can hold the parcel of land free from the annuity which he, by his own application, and for his own benefit, imposed on it.

The only difficulty which I have felt is whether, as the annuity is made enforceable against the tenant by a special mode, and a special liability is in a special case imposed upon the estate and interest of the landlord, there is an implied exclusion of liability of the landlord for the accruing instalments when the holding comes to him. I do not think that is sufficient to exclude the ordinary remedies for a rentcharge which is undoubtedly in the first instance charged on the holding.

The Public Loans Act of 1883, by its 11th section, does away with the enforcement of the annuity as poor-rate, and makes it recoverable as rentcharges in lieu of tithes are recoverable, which includes in this instance the proceeding by civil bill brought here. The proviso saves the provisions in section 16 as to ordering a sale

of the tenancy, and those consequent on the sale, and the contingent liability of the landlord in such case, *i.e.* of course for the deficiency in the consolidated amount. This creation of the new remedy seems to me to leave the case where it was. The appellant's counsel also strongly contended that the charge came to an end with the termination of the tenant's interest by ejectment for rent, and as to the landlord by the dropping of the estate of the tenant for life, and for this he relied on the decision of this Court in *The Attorney-General* v. *Ireland* (1), and *The Attorney-General* v. *Wilson* (2), and others of the same class on the Drainage code. The answer, I think, is that the legislation is wholly different, and differs in the very particulars which led to the decisions in question. In the Drainage Acts the word "lands" could mean either the physical thing, or the estate or interest in the lands, and there were some clauses which went to support the contention for the Crown that the charge attached on the limited interest; but general words were held to be controlled by section 7, the application for the loan, section 11, the application by the person, and especially by sections 49 and 50—the sale sections—under which the conveyance is to be made to the purchaser, subject (reading in the definition) to rent services issuing out of the land; and in *The Attorney-General* v. *Wilson* (2), the Chief Baron relies on the unreasonableness of a construction which would make the estate of one person liable for money lent to another. Under the Arrears Act the landlord is one of the applicants for the loan, and in fact receives it, and the definition of "holding" gives an enlarged character to the subject charged.

Nothing can be made of the point that the landlord is in occupation actually of only a part of the holdings charged, as he is in receipt of rents and profits.

The question whether it makes any difference that the appellant claims as remainder-man under a settlement does not seem to arise in this case, as it was J. Scott Moore, the trustee of the whole estate, who applied for and obtained the advance; but, speaking for myself, I am of opinion, without reservation, that under the definitions of "holding" and "landlord" and

(1) 15 L. R. Ir. 135. (2) 31 L. R. Ir. 28.

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the frame of the Act, the charge would attach on Mr. Fletcher Moore, the landlord in possession, and that the landlord who applied for and got the advance would be treated for the purposes of this Act as representing all . . . interests in the estate including that of tenant for life and remainderman in fee, who had then an indefeasible estate under an appointment, and was of full age; and in my opinion the language of the 59th section of the Act of 1881, for which the Act of 1882 is substituted, makes the person who happens to be "landlord for the time being" in all cases liable. By that section the landlord for the time being can recover against the tenant the increased rent. Here the tenancy was a continuing one against the estate as appears from the case, for Mr. Moore evicted it for non-payment of rent, and he would have been entitled by virtue of his position as landlord to recover the continuing increased rent which, by virtue of the loan and 59th section of the Act of 1881, is a charge on the lands.

The question involved in the appeal was considered and decided by Lord Justice Holmes in the two cases on circuit referred to, and in my opinion the full argument and consideration which the case has received on the appeal have fully established that his decisions were right.

I think the appeal should be dismissed.

HOLMES, L.J.:—

The order appealed from contains the somewhat exceptional statement that the King's Bench Division deems it right to follow the decision in the case of *The Irish Land Commission* v. *Scannel* (1), and accordingly declares that the defendant is liable.

The case referred to was an ordinary Civil Bill appeal, which I heard as Judge of Assize; and, however gratifying it may be to me personally to find a Divisional Court attaching so much weight to my opinion, I should prefer on the present occasion to have the assistance of the independent judgment of the Lord Chief Justice and his colleagues. My observations in that case in so far as they have a bearing on this appeal were *obiter dicta* only.

(1) 30 L. R. Ir. 287.

The process was brought to recover arrears of a rentcharge similar in kind to those for which Mr. Moore is sued, and it was dismissed by me upon grounds to which it is unnecessary to refer; but inasmuch as the effect of an eviction of the tenancy for non-payment of rent upon the incidence of the rentcharge was discussed very fully by both parties, I thought it right to express the opinion that it was still a charge on the landlord's estate, notwithstanding such eviction, and would have been recoverable were it not for certain exceptional circumstances. As this was not my *ratio decidendi*, I considered the point somewhat hastily, and dealt with it briefly. The same question, however, came before me three years later at the Kerry Assizes in the case of the *Irish Land Commission* v. *Sir Maurice O'Connell* (1); and it being then necessary for me to determine it, I gave it as full consideration as was possible on circuit; and I stated my views at considerable length. Having read the very accurate report of my judgment therein furnished by the solicitor for the plaintiffs, and having again examined the provisions of the Arrears of Rent (Ireland) Act, 1882, I abide by what I said in that case, and much of what follows is but a repetition of it. I may premise that when this subject was before me in Kerry, I was familiar with *The Attorney-General* v. *Ireland* (2), and *The Attorney-General* v. *Fetherstonhaugh* (3); and if those authorities had any bearing upon the case I was dealing with, I should have been relieved from some trouble. They are, however, decisions upon different and wholly dissimilar Acts of Parliament; and it is impossible to apply them to the arrears legislation of 1881 and 1882, which in both policy and language is unlike anything to be found in the Statute Book.

At the time it was enacted, Irish tenants were indebted to their landlords in large sums for arrears of rent, which could never have been paid or recovered in the ordinary way; and those provisions embody a method devised by Parliament for getting rid of them, in the case of small holdings, in the interest of landlord, tenant, and the country generally. This was to be done in two ways—either by an advance to be made out of a public fund by the Land Commission as a gift, or by a similar advance as a loan.

(1) *Ante*, p. 29. (2) 15 L. R. Ir. 135. (3) 30 L. R. Ir. 585.

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The first part of the Act of 1882 deals with the gifts and applies to holdings within the Land Law (Ireland) Act, 1881, where the valuation is not more than £30 a-year. It is not necessary for my present purpose to refer to it in detail. It is enough to say that the advance depends upon a judicial determination of certain preliminary matters which may be made on the application of either landlord or tenant, and that as far as the landlord is concerned it is in a measure compulsory.

Section 16 relates to advances by way of loan, and is only an amendment of the 69th section of the Land Law (Ireland) Act, 1881, which provides that when it appears to the Court on the joint application of the landlord and tenant of any holding, the annual valuation of which does not exceed £30, that the tenant has paid the whole or such sum as the landlord may be willing to accept of the rent payable in respect of the year of the tenancy expiring on the gale-day next before the 22nd August, 1881, and that antecedent arrears are due, the Land Commission may make, in respect of such antecedent arrears, an advance of a specified amount, and thereupon the Court shall by order declare the holding to be charged by way of re-payment with a rentcharge payable for fifteen years, and calculated at the rate of £8 10*s.* for every £100 advanced.

If for the word "holding" there is substituted the definition of that term to be found in the 57th section, the result is to show that what was charged with the rentcharge, was during the continuance of the tenancy, the parcel of land held by the tenant, and, upon the determination of such tenancy, the same parcel of land discharged therefrom.

I can draw no other conclusion from these words than that the rentcharge is to issue out of the combined interests of both landlord and tenant in the parcel of land; and having regard to the fact that the advance is for the benefit of both and can only be made on the application of both, this is the natural and reasonable construction. Indeed, the matter is placed beyond doubt by the provision as to payment. The landlord is to pay the rentcharge to the Land Commission, and he may recover the amount so paid as an addition to the tenant's rent—a mode of payment which is only consistent with both estates being subject to the charge,

although as between landlord and tenant the interest of the latter is the primary security.

The 16th section of the Act of 1882 is a re-enactment with some amendments of the 59th section of the Act of 1881. The maximum valuation of the holding is raised from £30 to £50; the period of repayment is increased to thirty-five years; the annual rentcharge is to be calculated at the rate of £5 for every hundred of the advance; the time within which the application may be made is extended; and certain changes are made in the machinery for recovering the rentcharge. But the language by which the charge is created is identical with that of the provision of the previous year; and unless a different interpretation is to be given to the same words in two statutes in *pari materia*, there is no alteration in the incidence of the charge. Indeed this is emphasised by the substituted machinery for collection.

Instead of the landlord paying the rentcharge, and adding the amount to the tenant's rent, it is to be recovered from the tenant by the poor-rate collector as if it were poor-rate; and if the tenant makes default in payment for the space of twelve months, the entire of the unpaid residue of the charge may be raised by a sale of the tenancy, and any deficiency is to be paid by the landlord, and be a charge upon his estate and interest in the holding. Both estates are thus made liable, but that of the tenant is the primary security. Mr. White in his able argument, on behalf of the defendant, fell into one error. He assumed that the only mode in which arrears of a rentcharge of this kind can be recovered is in the mode prescribed for the realization of the unpaid residue of the charge where there has been default. If he is right in this, the plaintiffs must fail in the present case, for this is not their cause of action; they are only suing for four half-yearly gales of the rentcharge. But he has overlooked an important matter.

Where an estate in lands is made subject to a rentcharge, whether it be by statute or otherwise, it may be assumed that a mode of recovering it is provided. Different machinery for this purpose was prescribed in the Acts of 1881 and 1882; but neither proved satisfactory; and the 11th section of the Public Works Loans Acts, 1883, substituted another mode of procedure

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which is still in force, and with which our law was previously familiar in the case of tithe rentcharge.

The rentcharge may be recovered by bill in Equity, action of debt, or on the case, and, if not exceeding £20, by civil bill. The simplest of these methods is the action or civil bill for debt. It is brought against the owner of the estate charged with the rentcharge, and if he is in receipt of the rents and profits, it is no defence that he has not realized out of the lands enough to meet the charge. Since the year 1838, proceedings of this kind have been of frequent occurrence for the recovery of tithe rentcharge. Since 1883 it has been the appropriate remedy in the case of a rentcharge under the arrears legislation. As long as the tenancy exists, the action or civil bill must be brought against the tenant as his interest is the primary security; but when that interest comes to an end, what is there in either the statutes or in legal principle to prevent its being brought against the landlord, if I am right in holding that by the terms of the enactment it is also charged on his estate?

For these reasons I am of opinion that where the landlord evicts the tenancy for non-payment of rent, or puts an end to it by notice to quit, the lands in his hands remain subject to the rentcharge, and whether he relets them to a tenant or not, he can be sued for the accruing gales. It does not follow that in such cases he can be made answerable for the unpaid residue of the charge. I am disposed to agree with Mr. White that his liability for any portion thereof only arises after there has been a sale of the tenancy; but this is another question which does not arise in the present case.

There is a matter which has been referred to, and which I have not overlooked. The appeal was opened and discussed upon the assumption that the defendant was successor in title to the landlord who joined in the application and received the advance; but just before the arguments concluded, it was suggested that the latter was only a tenant for life, that the defendant is tenant in remainder under a settlement, and that, consequently, the relation of predecessor and successor in title does not exist between them. If this were so it would raise a question upon which I should be sorry to express a view hostile to the defendant. It might

be argued that the rentcharge was only charged upon the parcel of land in the hands of the tenant during the tenancy, and upon the determination of the tenancy in the hands of the immediate landlord and his successor in title.

It is possible that this is the true construction of the enactment, and that, therefore, the rentcharge would not attach to either a paramount or independent estate. It is, however, unnecessary to decide this point, because, upon examining the case stated, I find that, although the defendant's mother was equitable tenant for life, the lands were vested in trustees by whom the advance was applied for, and to whom it was made. These trustees represented the entire estate in the land, and it is this estate which was charged with the rentcharge.

Solicitor the plaintiffs: *W. Alexander.*
Solicitor for the defendant: *Toomey.*

R. D. M.

IN RE STAUNTON, A BANKRUPT (1).

Bankruptcy—Annulment of—Offer by bankrupt to pay 20*s. in the* £1 *and costs of bankruptcy—Interest—Interest-bearing debts—Irish Bankruptcy Act,* 1857 (20 *&* 21 *Vict. c.* 60), *s.* 304.

S. was adjudicated bankrupt on the 15th October, 1886, the amount of the debts proved being £1308, and the only assets consisted of the life interest of the bankrupt in a rentcharge of £200 payable out of lands in the county of Kilkenny, and also of a jointure of £100 a-year charged on the same lands. These lands were subject to prior charges, and M., one of the prior chargeants, brought an action in the Chancery Division to raise her charge. A Receiver was appointed in 1886, and from that date till 1893 the entire profits of the lands was devoted to paying off M.'s charge. Since 1894 the surplus became available for payment of the creditors in bankruptcy. In September, 1899, 10*s.* in the £1 was paid; in January, 1900, a further dividend of 5*s.* was paid; and, in January, 1901, a dividend of 2*s.* 6*d.* There was no further money immediately available from the rents of the lands to make any payment.

(1) Before WALKER and HOLMES, L.JJ.

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The bankrupt was sixty-four years old, and was not a good life, and the assignees had not, up to the date of the motion, taken any steps to sell the life interest in the lands. The bankrupt applied that, on payment by her of the sum of 20*s.* in the £1 and of the costs of the bankruptcy, the bankruptcy should be annulled :—

Held (reversing the decision of Boyd, J.), that the bankruptcy should be annulled on the terms offered by the bankrupt.

APPEAL from an order of Boyd, J., dated the 26th March, 1901, by which he refused the bankrupt's application to annul the bankruptcy upon payment to the creditors of the balance necessary to bring up the total dividends to 20*s.* in the £1, and also on paying all the costs and charges incidental to the bankruptcy. The bankrupt, Margaret Staunton, a farmer at Seskin, Ballyragget, county of Kilkenny, was adjudicated a bankrupt on her own petition on the 15th October, 1886, the amount of her debts being £1308 15*s.* 1*d.*, and the only assets were certain life interests of the bankrupt in the lands of Seskin. This interest consisted of a rentcharge of £400 a-year (Irish currency) charged upon the lands of Seskin, in the county of Kilkenny, and the bankrupt was entitled to a moiety of the £400 a-year for life, and also to a jointure of £100 a-year, charged (*inter alia*) upon one-fourth part of the said rentcharge. Mrs. Moore, the owner of the remaining fourth part of the rentcharge, brought an action in 1886 in the Court of the Master of the Rolls to realise the arrears of her charge. A receiver was appointed by Porter, M.R., on the 15th July, 1886, and had since continued in possession of the lands. From 1886 until 1893 the entire profits of the lands were devoted, in pursuance of the decree of Porter, M.R., to paying off Mrs. Moore's charge, and from 1894 to the present time the surplus became available for the bankrupt's creditors. Dividends had been declared. On the 19th September, 1899, 10*s.* in the £1 was paid to the creditors. On the 17th January, 1900, a further sum of 5*s.* was paid; on the 22nd January, 1901, a dividend of 2*s.* 6*d.* was paid; and the present application was to pay the remaining sum of 2*s.* 6*d.* in the £1, making 20*s.* in all, and also to pay the costs of the bankruptcy. The bankrupt had not stated her interest in the lands in the schedule of assets, but it was ascertained on her examination in the bankruptcy in 1887. The bankrupt was 64

years of age, and no proceedings had been taken by the official assignees to realise the value of her life interest prior to the present application. Latterly the lands of Seskin had not produced more than £20 a-year, and there was nothing immediately due to pay creditors. The application was opposed before Boyd, J., by two creditors, on the ground that the creditors were entitled to interest on their debts under the 304th section of the Bankruptcy Act, 1857. Boyd, J., refused the application.

The bankrupt appealed.

Molony, K.C., and *W. G. Gibson*, for the appellant:—

We submit that the appellant is entitled to have the bankruptcy annulled under the general jurisdiction of the Court. If a bankrupt pays 20*s.* in the £1 to all the creditors, and the costs and expenses of the bankruptcy, the Court ought to annul the bankruptcy. There is no interest upon debts in bankruptcy after the date of the adjudication: *Re Savile* (1). Section 304 of the Bankruptcy Act, 1857, has no application to any case in which there is no surplus in Court. If there is a surplus, for payment of which the bankrupt applied, the Court might pay interest on the debts before paying the surplus to the bankrupt. The assignees have never tried to make out that the bankrupt had any available assets until the date of our application. They evidently thought they could not realise anything by endeavouring to sell the life estate of the bankrupt.

Blood, K.C., and *Megaw*, for the opposing creditors:—

The debts of our clients are both interest-bearing debts; one is a creditor on a bond, and the other on a bill of exchange. We are entitled to interest when there is this life interest belonging to the bankrupt capable of being sold to pay it: *Bromley* v. *Goodere* (2). The case is within section 304: *Ex parte Mills* (3).

Moore, K.C., for the official assignees:—

If a bankrupt applies to annul the bankruptcy the Court can look at the whole of the circumstances of the case, and if the conduct of the bankrupt has not been straightforward, or if there has

(1) L. R. 7 Ch. 760. (2) 1 Atk. 75. (3) 2 Ves. Jun. 295.

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been any concealment of property, will refuse the application: *Re Taylor, Ex parte Taylor* (1). There has been concealment of property. [Counsel asked for a reference to the Chief Clerk to ascertain if there were any other creditors.]

WALKER, L.J.:—

We think that the appeal should be allowed, and the order asked for by the notice of appeal made. *Prima facie* a person who is adjudicated bankrupt, either on his own petition or on the petition of others, is entitled to get rid of his bankruptcy by payment of 20*s.* in the £1 to the creditors, without interest—that is, without payment of interest, accrued subsequently to the adjudication. In this case if the appellant had, two years (say) after the bankruptcy, come forward and offered 20*s.* in the £1, I do not think that the Court could have refused to annul the bankruptcy because there was an asset in existence, which might or might not at some remote date produce a surplus, and thus create a claim for interest when the surplus was being dealt with.

When the application was before Boyd, J., the assignees did not oppose; but they are represented here by Mr. Moore, who has opposed on grounds also put forward by counsel for the two creditors. He contended that the bankrupt was guilty of misconduct which disentitled her to succeed. I see no ground for imputing such to her, even if the section of the English Act referred to applied. It was also said we should wait for the realization of the property, but the assignees for many years have taken no steps to realise it, and only obtained the order to do so on the same day when the order was made by Judge Boyd, and obviously for the purpose of giving it support. I do not think we can consider the alleged rights of the creditors, who did not prove, and who have been passed by in the payment of dividends, and do not now claim. The rule of law applicable in bankruptcy is that interest is not payable upon debts in bankruptcy after the adjudication; it is only given in one special case, viz. when there is a surplus then the Court may give it. That was the decision, based upon equitable principles, applied in *Bromley* v. *Goodere* (2), cited by Mr. Blood, and in *Ex parte Mills* (3). This principle was adopted by

(1) [1901] 1 Q. B. 744. (2) 1 Atk. 75. (3) 2 Ves. Jun. 295.

the Legislature in the reign of George 3, and creditors were given a right to claim interest, but only when there was a surplus. As to the 304th section of the Bankruptcy Act, referred to by Mr. Blood, that section, in my opinion, only applies where there is a surplus, and the Court is disposing of such surplus. There is no ground for a reference as suggested by Mr. Moore. No such reference was asked for in the Court below, and I see no legal ground for making it here. Under these circumstances I think that this lady is entitled to have the bankruptcy annulled on payment of 20*s.* in the £1 to her creditors, and the costs mentioned in the notice of appeal; and that the order of Boyd, J., should be reversed. The costs of the appeal must be paid by Mr. Blood's clients, who opposed the application. We shall not give any costs against the assignees.

HOLMES, L. J.:—

Mr. Moore has failed to show that the bankrupt has been guilty of misconduct such as would deprive her of any right or privilege to which she would otherwise be entitled. Where a bankrupt, with the assistance of friends, offers to pay the costs of the proceedings, and to discharge to the full his liabilities to creditors on condition that the bankruptcy be annulled, the offer ought, in my opinion, to be accepted in the absence of such misconduct as I have referred to. I see no necessity for a reference to the registrar for the purpose of ascertaining whether there are other creditors in addition to those who have proved. It is said that the bankrupt in her statement of affairs returned the names of a few creditors who never proved. All, except one of these debts, were for small amounts, and the proofs of at least some of them were disallowed. The one substantial creditor for a sum over £150 would, I have no doubt, have proved long ago if he had not good reason for not doing so. He had a situation in Dublin, an address in Birmingham, and was living in Holland or Belgium. Neither he nor his solicitor would have allowed thirteen years to pass, and these dividends to be paid without sign, if he could have proved successfully; and it having been shown that the bankrupt has taken all reasonable steps to communicate with him without success, I am of opinion that if the bankrupt is

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otherwise entitled to carry her application, she ought not to be delayed by a reference.

The appeal, therefore, is confined to the net point discussed before Mr. Justice Boyd, whether, under the 304th section, the creditors are entitled to interest on their debts.

Now, it is quite clear that interest does not run after adjudication; and if the creditors are entitled to interest, it depends on this section. At present the produce of the bankrupt's estate is not sufficient to pay twenty shillings in the pound, much less interest thereon; and therefore the case does not come within the terms of the section. It is, however, said that something more might possibly be realised hereafter. This is doubtful; and besides, when the assignees have had fourteen years to realise a bankrupt's estate, I am not disposed to keep the bankruptcy open on chance of their doing something now which they have not done before. The creditors generally seem to think that it is for their interest to accept the offer; only two oppose it; and the payment of twenty shillings in the pound in a bankruptcy is not so common as to be discouraged. I therefore hold that the appeal ought to be allowed.

Solicitor for the appellant: *M. Murphy.*

Solicitors for the official assignees, and the creditors: *Geoghegan & Sons.*

R. D. M.

KENNY *v.* LABARTE (1).

(1899. No. 17,833.)

Andrews, J.
1900.
Nov. 5–9, 15, 16.
1901.
Jan. 12.

Landed Estates Court conveyance—Description of premises—Adequacy of—Schedule and map inconsistent—Rejection of later description—Falsa demonstratio.

Where two adequate descriptions occur in a deed, each purporting to describe what the deed conveys, and these descriptions are, in fact, at variance with each other, the earlier description must prevail.

An action was brought to recover possession of premises known as 22, 23, 24, and 25, M.-street, formerly D.-street, in the town of C. The plaintiff's title was under a Landed Estates Court conveyance, whereby "the premises situate in or near D.-street in the town of C., then in the occupation of T. L., and more particularly described in the schedule thereunder written, and delineated on the annexed map," were, with others, conveyed in fee simple, subject to the lease referred to in the schedule. The description in the schedule was—"*Tenants' names*, representatives of T. L.; *description*, in front to D.-street 43 feet, and from front to rere 58 feet; *rent*, 9*s.* 3*d.*; *tenure*, lease for 199 years from March, 1700." The map merely showed a plot of ground coloured red, bounded partly by D.-street, and partly by a lane.

It was proved that the premises 22, 23, 24, and 25, M.-street formed no part of the premises described in the body and schedule of the conveyance, and were held by the defendants under a different title:—

Held, that the description in the body and schedule of the conveyance was an adequate description of what was intended to be conveyed, and that the additional description on the map was an erroneous description, and should be rejected.

Bradford v. *Dublin and Kingstown Railway Co.* (7 Ir. C. L. R. 57), *Roe* v. *Lidwell* (9 Ir. C. L. R. 184), and *Dennehy* v. *Corrigan* (2), followed.

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(1) Before ANDREWS, J.

(2) DENNEHY *v.* CORRIGAN (1896. No. 5719). This was an action of trespass to premises situate in Great Brunswick-street, in the city of Dublin. The facts of the case, so far as they are material, are stated in the judgments of the Court of Appeal, delivered 17th December, 1897:—

LORD ASHBOURNE, C.:—

This case was tried before the Lord Chief Baron, who, having submitted the appropriate questions to the jury, and having received their answers,

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TRIAL OF ACTION. The facts of the case and the authorities referred to are sufficiently stated in the head-note and judgment.

The Right Hon The Macdermot, Q.C., Wakely, Q.C., and *H. G. Richards*, for the plaintiffs.

O'Connor, Q.C., W. M. Jellett, Q.C., and *M'Loone*, for the defendants.

1901.
Jan. 12.

ANDREWS, J. :—

This action, which was tried before me without a jury at the last Michaelmas Sittings, was brought to recover the possession of premises known as Numbers 22, 23, 24, and 25 Mitchell-street, and Number 8, Flanagan's-lane in the town of Clonmel.

directed a verdict for the defendant. The plaintiff then moved in the Queen's Bench Division to set aside the verdict and judgment obtained by the defendant, and to enter a verdict for the plaintiff; and the learned Judges of that Division (O'Brien and Madden, JJ., Holmes, J., dissenting) acceded to the application, and entered judgment for the plaintiff. From that order the defendant has appealed, and we have had the case very fully and ably argued before us.

The defendant claims under a conveyance dated 11th August, 1892, in which the parcels are described as "All that and those that plot of ground with buildings thereon known as 167 Great Brunswick-street, and as more particularly delineated and described in the map or plan annexed to these presents, and therein coloured pink." The plaintiff claims the same piece of ground under a conveyance dated the 20th April, 1893, in which the parcels are thus described:—"All that hereditament . . . known as 167A . . . and as more particularly delineated and described in the map or plan endorsed on these presents." It is worthy of note that Madden, J., in his description of the parcels in the plaintiff's conveyance omitted the word "and" before "as," the word not being, I think, at all devoid of importance.

The piece of ground in dispute is admittedly included in the map endorsed on the plaintiff's deed, and is clearly excluded from that annexed to the deed under which the defendant claims. The jury have found that the plot in dispute did, as a matter of fact, form part of the premises known "as 167 Great Brunswick-street," and did not form part of what was known as "167A." The defendant was, under his conveyance of the 11th August, 1892, put into possession of "167," including the disputed part, by the grantor, who must be assumed to have known what he intended to convey, he being then also the owner of "167A," which he did not assign to the plaintiff until the year after. The evidence was quite sufficient to sustain the findings of the jury, provided

The title relied on by the plaintiffs was a Landed Estates Court conveyance in fee to Joseph Kenny (since deceased) dated the 21st April, 1860, and a devolution of his title to the plaintiffs. By that conveyance two portions of the estate of the trustees of the Earl of Glengall, and others, owners and petitioners, were granted to Joseph Kenny. One portion, which is not in dispute, is situate in Main-street, Clonmel, and this action is not concerned with it. The other portion is what this action relates to, and it is described in the grant in the body of the conveyance (omitting the description of the Main-street portion) as follows:—"The premises situate in or near Dublin-street" (which was subsequently named Mitchell-street) "in the town of Clonmel and county of Tipperary, now in the tenancy or occupation of the

that any questions were for their determination. The plaintiff, however, contends that the matter in dispute is really concluded between the parties by the maps attached to their respective conveyances; and that, as there was no question as to the identity of the piece of ground in dispute with what was included in his map, he was entitled to a direction.

The question in the present case is what, upon the true construction of the deeds before us, is the description of the parcels of land thereby conveyed? The defendant contends that his conveyance contains two descriptions of, it may be, equal certainty, the former being contained in the words "that plot of ground with buildings thereon known as No. 167 Great Brunswick-street," and the latter being the delineation of the parcels in the map. He insists that, assuming these descriptions to be separate and independent, a variance between them has been shown to exist by extrinsic evidence; and that if this be so, the earlier description in the deed must prevail, and the description in the map be rejected.

On the other hand, the plaintiff contends that the operative part of the deed contains, not two descriptions, but one description, the entire of the parcels being defined and effectually controlled by the words "and as more particularly delineated and described in the map." According to this view the subject-matter of the deed is the plot of ground as delineated on the map. The questions that arise, therefore, are: Is there in the deed sufficient certainty and demonstration without the aid of the map? and is the reference to the map "an accumulative description," or is it an essential part of the description of the parcels? Are there two independent descriptions, or read together do the parcels form one description?

The defendant relies upon the case of *Roe* v. *Lidwell* (11 I. C. L. R. 320) decided by the Court of Exchequer Chamber in accordance with the decision of the same Court in *The Dublin and Kingstown Railway Co.* v. *Bradford*

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representative of Theobald Lewis, and more particularly described in the schedule hereunder written and delineated in the annexed map with the appurtenances." The *habendum* is to "Joseph Kenny, his heirs, and assigns, for ever, subject to the leases referred to in the schedule," and subject, in conjunction with other specified lands of large extent, and certain other premises in the town of Clonmel, to a jointure rentcharge of £3200 per annum for the life of Margaret Lauretta Countess of Glengall, created by Richard Earl of Glengall by the settlement executed on his marriage with the Countess, dated the 19th February, 1834, and to two other yearly rentcharges of £800, and £400 respectively, also created by Richard Earl of Glengall in 1844, but indemnified against all these rentcharges by the lands therein particularly mentioned.

(7 I. C. L. R. 57, 624)—cases of the highest authority decided on Incumbered Estates Court conveyances. The plaintiff in *Roe* v. *Lidwell* sought to recover in ejectment on the title 45 acres which were proved to form part of the lands of Dromardbeg. In support of his claim, he relied on an Incumbered Estates Court conveyance in 1853 of "the town and land of Dromardmore, containing 1085A. 0R. 23P. statute measure or thereabouts, and described in the annexed map." The 45 acres in question were within the boundaries of the map, and were required in order to make up the acreage specified in the conveyance. Evidence was given at the trial that these 45 acres formed part of the town and lands of Dromardbeg, not of Dromardmore; and the Court held, affirming the judgment of the Court of Common Pleas, that nothing but Dromardmore passed under the conveyance of 1853. I regard *Roe* v. *Lidwell* as a clear decision of the highest authority, and of direct bearing on this case, and there is nothing in *Boyle* v. *Mulholland* (10 I. C. L. R. 150) or any subsequent case to weaken, or lessen its force.

In my opinion the words in the deed of the 11th August, 1892, "All that and those that plot of ground with the buildings thereon known as 167 Great Brunswick street," are quite capable of being, and are an adequate and sufficient description. I see nothing whatever to prevent a house and premises being, and to be, known by a number. I should think that the vast majority of the houses in London and Dublin are so known, and have no other description. Here there was no doubt or uncertainty in fact or action, for the defendant was at once put into possession of the premises so known by the person who knew them best, the previous owner and occupier. I cannot see anything in the words of the deed referring to the map to cut down, or regulate, or control the already sufficient and adequate description. The map was narrower by an omission of the small part in dispute. Suppose the blunder had been greater, and only half the premises admittedly "known

The schedule to the conveyance of 1860 describes the Dublin-street premises in appropriate columns as follows:—"*Denomination*, premises in the town of Clonmel; *Tenants' names*, representatives of Theobald Lewis; *Description*, in front to Dublin-street 43 feet, and from front to rere 58 feet; *Yearly rent*, 9*s.* 3*d.*; *Gale days*, 25th March and 29th September; *Tenure by which tenant holds*, lease for 199 years from March, 1700." Neither this lease nor any copy of it is forthcoming, nor is any fuller statement of its contents in evidence.

It was not suggested that the Main-street premises were not correctly delineated on the annexed map. What purports to be a delineation thereon of the Dublin-street premises is a rectangular plot coloured red, having apparently defined boun-

as 167" were delineated in the map, could it be argued on the construction of these words that the defendant was to lose half of what he bought? I can see no reason for imputing in this case any prerogative significance to the word "as." That word is followed by the words "more particularly," which convey that there had been another antecedent description. There may, of course, be cases where "as" is so used as to make the map it refers to the governing part of the description, but this is not such a case.

In my opinion the description of the deed of the 11th August, 1892, "All that and those that plot of ground with buildings thereon known as 167 Great Brunswick-street," is sufficient and complete in itself, and, taken in connection with the findings of the jury, entirely warranted the direction of the Lord Chief Baron. I therefore think that the judgment for the defendant should be restored and the appeal should be allowed with costs.

FITZ GIBBON, L.J.:—

The necessity for considering the particular words of the deed in this case with minute accuracy is shown by what Madden, J., says as to the position of the word "as." "On this point," he says, "the observations of Monahan, C.J., in delivering the judgment of the Court of Common Pleas in *Roe* v. *Lidwell* are important." "The decision in that case," he observes, "might have been different if it appeared upon the face of the conveyance that the thing purchased consisted of these particular 45 acres; as if, for example, the deed purported to convey the lands under the words 'All that and those that parcel of land containing 105 acres, meared and bounded as in the annexed map.' In such a case he suggested that the rule of *præsentia corporis* might apply. And certainly since the decision in *Roe* v. *Lidwell* the idea has been current in the profession that a distinction would be taken between the words '*and* described' and '*as* described' when used with reference to a map. That this

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daries on all sides, not showing the outline of any building or division, save a straight perpendicular line, running through the plot from front to rere, and bounded on the west and north by what appears on the map to be a lane, with parallel sides, not shown to be in any part built over. The scale of the map is 88 feet to one inch, which is not large enough to make a perfectly correct scale measurement otherwise than difficult; but the evidence satisfied me that this plot on the map scales as nearly as possible 58 feet from the front to the rere, which, as nearly as possible, corresponds with the measurement on the ground from the front to the rere of the premises in dispute. This did not appear to be controverted at the trial. The evidence also satisfied me, and it did not

distinction suggested some real difference to the minds of such high authorities as Longfield, J., and Hargreave, J., I conclude from the fact (which I have ascertained by inquiries) that care was taken after the decision in *Roe* v. *Lidwell* that the first-mentioned form of expression only should be used in the conveyances of the Court."

I have taken the trouble to look at the conveyances of the Landed Estates Court, and certainly there is no uniformity in the expressions used. But the foundation of this argument, and the foundation of the judgment of Madden, J., disappear, in my opinion, by reference to other authorities. The crucial test-question is to be found in Shepherd's Touchstone, p. 247—"Whenever there is in the first place a sufficient certainty and demonstration, and afterwards an accumulative description, and it fails in point of accuracy, it will be rejected."

Now if there was in the conveyance only a vague description, such as "All that and those that parcel of land containing 1085 acres"—that would be no description at all, but only a reference to 1085 acres somewhere, which could not be found except by reference to the map. But in the present case the plaintiff must recover on the strength of his own title, and we must first look to the deed to see whether the description of the property is clear and free from ambiguity. The Lord Chancellor has pointed out that the parcels in the plaintiff's deed have been misread in the Court below. The words are—"All that dwelling-house, shop, messuage, and premises situate on the south side of Great Brunswick-street, and known as 167A Great Brunswick-street, *and as* more particularly delineated and described in the map or plan endorsed on these presents, and coloured pink."

In order to come within that description in the parcels there must be a dwellinghouse known as 167A *and* delineated on the map. The words then come within the definition in Shepherd's Touchstone, as giving first a sufficient

appear to be controverted, that the same plot scales on the map as nearly as possible, 50 feet in front to Dublin-street, and that either 43 feet or 50 feet in front, measured from west to east on the ground, would go into an existing house, and that a line drawn on the ground from the end of either the 43 or the 50 feet to the rere would have nothing in the nature of an existing division to represent it on the ground. I was, however, also satisfied upon the evidence, including some scale measurements on the map and on the ground which agreed, that, although the sides of Flanagan's-lane on the ground are not parallel, and although it is partially built over at its Dublin-street end, the lines on the map, which appear to indicate a lane along the west and north sides of the plot in question, were intended to

description, and then a cumulative description. Then the question is whether what amounts to a sufficiently certain description goes first. As to this, Madden, J., says—"It is not necessary for the purposes of the present case to consider whether the description of the messuage as formerly known by a certain number has the same certainty and demonstration as to its metes and bounds as the description of land as situate in the manor of Dale or the townland of Dromardmore." He did not think it necessary to consider it, but he had not noticed the word "as." O'Brien, J., took a different view from that. He says—"Now what is the inconsistency in the present case? The subject of the grant is called 'The house known as No. 167 Great Brunswick-street.' But it is said it is not the whole of No. 167. That is the case of 'kelp shore' exactly. Where is the complete description in a number that excludes any other description? A number is no legal description at all. It is a sign on the outside of the house, that tells nothing of what is inside or behind it—its depth, breadth, or height. It is an indication put up, or changed, for public convenience, and agrees alike with the whole or any part of the premises." With all respect, the number of a house is the *name* of the house, in the same way that the name of a townland is its denomination. The existing and described thing is the dwellinghouse known as No. 167A.

The conveyance to the plaintiff was executed on the 20th April, 1893, and on that day there was a place, representing what was conveyed to him, with solid walls all round it. There was something adjoining it, which never was part of it. There was a house known as No. 167A. The thing and the description are more definite than where a townland is described by name. It would be against our ideas of fair dealing if a man who bought a house known by a number, should walk into the house next door because a map had wrongly taken it in. The question of construction would be more difficult on the defendant's conveyance; but here the plaintiff must succeed on the strength of his

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indicate Flanagan's-lane, which in fact bounds the premises in dispute on the west and north. The object of indicating this lane on the map was obviously, in my opinion to show the locality of the plot in question. The east and south sides of Flanagan's-lane on the ground are straight, as shown on the map, and it was not necessary to show thereon the irregularities on the west and north sides of the lane as they exist. The devolution of title from Joseph Kenny to the plaintiffs was not disputed, and, although the evidence for the plaintiffs, to which I shall afterwards refer, failed to satisfy me that the rent of 9*s.* 3*d.* British, corresponding with 10*s.* Irish, issued, or was payable, out of the premises in dispute, I am of opinion that by the aid of the map on the conveyance of 1860 the evidence

own title, and he cannot succeed without parol evidence. But when he closed his case, it was shown that the plot of ground which he was suing for was outside the walls of his house, and was wrongly included in his map.

The defendant's deed, which is not as accurate as it might be, is important also. It describes the premises as "All that and those that plot of ground with buildings thereon on the south side of Great Brunswick-street and known as 167 in said street, *all as* more particularly delineated and described in the map or plan annexed to these presents and therein coloured pink." I think that the words "All as more particularly delineated or described in the map" are capable of construction as the dominant description, and the words "All that plot of ground with buildings thereon and known as 167 in said street," as introductory to that description. But the map is not the only thing to be looked at, and as there is an ambiguity, it is open to the party to go into evidence.

Here all the justice of the case is in favour of the defendant. When he got his conveyance, and was put into possession, he did not expect to be disturbed. The map on the conveyance to the party next door included what he was never intended to get, and did not get, and his claim to put his neighbour out of what he has got is not a proceeding that should commend itself to the Court.

It is a pity that the original deeds were not examined in the Court below, and that their effect was decided upon a mistaken idea of what was contained in them.

WALKER, L.J.:—

The plot of ground in dispute in this action lies between Nos. 167 and 167A Great Brunswick-street, which adjoin each other. The Railway Company, who had acquired both premises, sold them separately, and conveyed them—No. 167 to the defendant on the 16th August, 1892, and No. 167A on the 20th April, 1893, to the plaintiff.

of the plaintiffs made out a *prima facie* case, which, taken by itself, would entitle them to a verdict for the possession of a plot of ground measuring in front to Dublin-street (now Mitchell-street) 43 feet from the east side of Flanagan's-lane, and bounded on the west and north by the east and south sides of that lane, with the exception of a small rectangular plot in the rere, bounded on the west and north by Flanagan's-lane, and comprised within the red plot shown on the map of 1860. This small plot, which represents Number 8, Flanagan's-lane, was admittedly conveyed (*inter alia*) to the grantees in a later Landed Estates Court conveyance, dated the 7th May, 1895, to which I shall again refer, and this action was, therefore, discontinued as regards 8, Flanagan's-lane, but continued as regards Numbers

It has been found by the jury that on the 16th August, 1892, the plot in question was part of the plot known as 167, and it has been also found that the same plot was not until the 20th April, 1893, part of 167A. The conveyance to the defendant of the 11th of August, 1892, grants "All that and those that plot of ground with the buildings thereon on the south side of Great Brunswick-street, and known as No. 167 in said street, situate in the parish of Saint Mark, and city of Dublin, all as more particularly delineated and described in the map or plan annexed to these presents and therein coloured pink." The plot in dispute is not included in the map. The defendant went into possession of the premises, including the plot.

In the plaintiff's conveyance of the 20th April, 1893, the premises granted are described as "All that hereditament, dwellinghouse, shop, messuage, and premises situate on the south side of Great Brunswick-street, and known as No. 167A Great Brunswick-street, in the parish of Saint Mark, and county of the city of Dublin, and as more particularly delineated and described on the map or plan endorsed on these presents and coloured pink."

The plot in dispute is included in that map, and the plaintiff in result rests his title upon this map, and the non-inclusion of the plot in the defendant's map.

There are certain rules of law applicable to the construction of grants in deeds which were taken as admitted in the Court below. The difference in the judgments rests upon the application of them. It cannot be denied that if there be once "an adequate and sufficient definition with convenient certainty of what is intended to pass by a deed any subsequent erroneous addition will not vitiate it;" nor can it be disputed that a grant referring to a map may be so worded that the map is an essential part of the grant, and that there can be no certainty without it. "The distinction," says Lord Cranworth in *Slingsby* v. *Grainger* (7 H. L. Cas. 283), "is between those cases in which

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22, 23, 24, and 25, Mitchell-street, which were the premises in dispute at the trial.

The defence was a denial of the identity of the premises in dispute with the Dublin-street premises granted by the conveyance of 1860, and the case made in support of the defence was that the premises in dispute were not portion of what had been the Glengall estate, of which the Dublin-street premises in the conveyance of 1860 had been a part, but were portion of what had been the Ormonde Estate, and were held under a different title, commencing with a patent grant, dated the 14th November, in the 18th year of the reign of Charles the Second, to James, Duke of Ormonde, his heirs and assigns, of (*inter alia*) "part of the west of Clonmell Burgarey, containing 53 acres, and 1 rood plantation

there has been a complete description of the thing given and a subsequent mis-description as to some particulars connected with it, and cases in which that which is subsequently connected with the description is so connected as to form part of the thing given."

In my opinion, in the first place, the grant of the premises known as No. 167, Great Brunswick-street and the grant of the dwellinghouse, shop, messuage, and premises known as No. 167A, Great Brunswick-street were each adequate and sufficient definitions with convenient certainty in themselves of what was intended to pass. A grant of premises known as No. 167 seems to me just as certain as "Dromardmore" in *Roe* v. *Lidwell*, or the excepted 12 perches and 3¼ yards in *Dublin and Kingstown Railway Co.* v. *Bradford*. It would be an apt and sufficient method of grant without a map, and it imports neither any generality nor vagueness, which would require restriction, modification, or explanation.

The cases relied on by the plaintiff cannot prove the rule and the exception. In *Barton* v. *Dawes* (10 C. B. 261) the conveyance was of "All that messuage or farmhouse, with the barns, sheds, etc., and several closes, pieces or parcels of land thereunto belonging, called Gotton farm, in the occupation of David Brown, and containing altogether 209A. 2R. 28P., and consisting of the several particulars specified in the first division of a schedule thereunder written, and more particularly delineated and set forth in the map or plan thereof drawn in the margin of said schedule." Neither schedule nor plan conveyed the close in question, and it was held that the deed was conclusive—that whatever else Gotton farm might have consisted of, the closes named and delineated were alone intended to pass. The conveyance was of those closes which were called Gotton farm, and were also included in the schedule. This case was decided on the special language of the instrument.

measure." The Landed Estates Court conveyance of May 7, 1895, admittedly conveyed to John Harley and others (*inter alia*), the plot constituting number 8, Flanagan's-lane (which was comprised in the map to the conveyance of 1860), and also "houses and premises in Flanagan's-lane, containing eight perches, and described on the annexed map with the appurtenances, and thereon coloured red." A reference to the schedule to this conveyance and the map shows that the whole of Flanagan's-lane passed to the grantees. The premises comprised in this conveyance were granted subject to, but indemnified against, the fee-farm rents which were reserved by indentures, dated respectively the 4th of October, 1711, and the 23rd March, 1703, which were granted by James Duke of Ormonde, whose estate would

Another case referred to was *Lanesborough* v. *Reilly*, cited in *Tottenham's Estate* (I. R. 3 Eq. 533), where the grant was of "that part of the town and lands of Gortgommon, in the barony of Coole, and county of Fermanagh, containing 16A. 3R. 26P. or thereabouts as described in the annexed map." That was a general description which could only be made certain by the map. So in *Errington* v. *Rorke* (7 H. L. C. 617) the grant was "All that part of the Bog of Allen and Clunagh, containing 777 acres, as described by a map annexed."

Lefroy, C. J., in his judgment in *Roe* v. *Lidwell* (at p. 327 of 11 I. C. L. R.) refers to the distinction existing in *Errington* v. *Rorke*. He says—"The grant was part of the Bog of Allen and Clunagh, but what part was not further specified than by reference to the annexed map, which alone afforded any certainty or ascertainment as to what part was intended to pass. The map was therefore the only means of certainty as to what was intended to pass." And so Monahan, C.J., at p. 193 in his judgment in *Roe* v. *Lidwell* says the result might have been different if the grant had been "All that and those the parcel of land containing 1085 acres meared and bounded as in the annexed map."

The case of *Boyle* v. *Mulholland*, when properly understood, is a case of the same class. It was a grant of "All that part of the lands of Ballaghan, together with the Kelp shore situate, etc., containing together 443A. 1R. 5P. statute measure or thereabouts, and described in the annexed map." Kelp shore was a wide subject-matter, and therefore the general term was restrained and modified by the map. Baron Greene points that out, and Baron Fitzgerald also. He says—"There is a subject-matter in which all the particulars mentioned in the grant concur; it is Kelp shore, it is comprehended within the limits marked on the map, and soforth. I assume the evidence rejected would have shown that it is part of a larger tract, which would properly be

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appear from the conveyance of 1895, to have surrounded the premises in dispute on the west and north. The evidence for the defence was also relied on as further showing that the indenture of 4th October, 1711, comprised (*inter alia*) numbers 22 and 23, Mitchell-street (part of the premises in dispute), and that the indenture of 23rd March, 1703, comprised the remainder of the premises in dispute, viz. numbers 24 and 25, Mitchell-street, and also the adjoining premises number 26.

The documentary evidence which was given on behalf of the defendants was as follows: [Andrews, J., here reviewed the evidence, and proceeded.] It has thus been established to my satisfaction, and on the evidence I find as a fact, that the premises numbered 22 and 23, Mitchell-street, are not any part of the premises

described as 'kelp shore,' but whose limits are different from and more extensive than those described in the map. The term 'kelp shore' is applicable to the whole, but the additional particulars in the grant limit it to an ascertained part."

O'Brien, J., treats the description "known as No. 167" the same as Kelp shore. I do not agree in that. The one points to something known by metes and bounds, the other imports a tract. It seems to me, therefore, that if the grant were of "No. 167 and described on the annexed map," the case would be absolutely ruled by the cases of which *Roe* v. *Lidwell* is a leading one. It is the very case put by Parke, J., in *Doe* v. *Galloway* (5 B. & Ad. 51)—"Where there is a sufficient description set forth of premises by giving the particular name of a close or otherwise we may reject a false demonstration; but if premises be described in general terms and a particular description be added the latter controls the former."

The only difference here as regards the plaintiff's deed is that the words "as more particularly" occur between the word "and" and the word "described." I cannot attach any special force to the words "more particularly" where the words "and described" follow a complete description. They import *per se* a further and more particular description, and the words "more particularly" are only the expansion of that. The words occurred in *Barker* v. *Richardson* (6 W. R. 663) decided by the Queen's Bench in England. That was a grant by bill of sale of all the goods in the grantor's house, but there was added "which was more particularly described in the schedule hereto." The schedule omitted some of the goods, and the question was whether such passed. Lord Campbell says—"I think the schedule does not impair the deed but only contains a further description of what passes by the deed." And Crompton, J., says—"I think the schedule is merely a false demonstration, the object of which was to point out the

described in the body of, and the schedule to, the Landed Estates Court conveyance to Joseph Kenny, of the 21st April, 1860, under which the plaintiffs claim them. I shall again refer to the map to that conveyance hereafter.

Documentary title has been also traced by the defendants to numbers 24, 25, and 26, Mitchell-street, as part of the Ormonde Estate, from the grantee in the indenture of 23rd March, 1703, to the same defendants, Adelaide La Barte, William H. R. Mossop, and the Norwich Union Life Insurance Society. Throughout this title also there is no reference in any of the deeds to a term of 199 years, or to any rent of 10*s.*, Irish, or 9*s.* 3*d.*, British. It was also shown at the trial that the enjoyment of these premises has been in accordance with the documentary title so traced, and

articles more particularly, but not to restrict the words in the deed to the articles enumerated." So far for the use of the words "more particularly." Is that altered by the use of the word "as" following such a complete description as "known as No. 167A?" The words "and as described" in the plaintiff's title deed import, I think, a cumulative description—a map description in addition to that by the close or number—equivalent to "and of which a more particular description will be found in a map annexed." It was quite possible to have made the map the granting part by apt words, or to have annexed some other description such as in *Barton* v. *Dawes*, which would cut down the grant. I do not think the word "as" sufficient to do it, at all events following so specific and complete a description as "known as No. ."

Then again the plaintiff must succeed on his own title against a defendant in possession, and, taking up his deed, there appears to me to have been—applying the well-known rule—no subject-matter which fulfilled both conditions of being 167A, and being comprised within the limits described on the map. There was just, as in *Roe* v. *Lidwell*, no subject-matter in which all the particulars mentioned in the grant concurred. This is really the same question in another form, as it assumes the existence of two descriptions. From the necessity of the case we are compelled, however, to differ from high authority.

I am of opinion, with only such measure of doubt as the difference of opinion creates, that the verdict for the defendant should be retained, and the appeal allowed.

Solicitor for the plaintiff: *Michael Dalton.*
Solicitors for the defendant: *Thomas Gerrard & Co.*

R. D. M.

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it has thus been also established to my satisfaction, and on the evidence I find as a fact, that the premises numbered 24 and 25, Mitchell-street are not, and it is not disputed that number 26 is not, any part of the premises described in the body of, and the schedule to, the Landed Estates Court conveyance of 1860, under which the plaintiffs claim, to the map of which I shall refer hereafter; but first I shall refer to the further evidence, including the parol evidence, which was given at the trial on both sides. [Andrews, J., then reviewed the evidence, and proceeded.]

It now only remains for me to consider the map to the conveyance of 1860, which I have already said was, in my opinion, intended to show the premises in dispute. This map is, in my judgment in point of law, and according to my finding, in fact, an erroneous description added to the independent description in the body of, and the schedule to, that conveyance, and not the governing description.

I am satisfied both in law and fact, and my decision is, that the premises in dispute in this action are not in whole or in part the Dublin-street premises described in the body of and the schedule to the conveyance of 1860, and in my opinion, therefore, the map must be rejected, and the description in the body of and the schedule to that conveyance must prevail. It is, no doubt, to be presumed that the premises so described exist, but they must, in my opinion, be outside of the premises in dispute, which the evidence, taking the whole of it together, has proved to my satisfaction are entirely distinct and different from the premises "situate in or near Dublin-street" thereby conveyed.

The common law principle upon which, in my opinion, the map must be rejected is, that where two adequate descriptions occur in a deed, each purporting to describe what the deed conveys, and these descriptions are in fact at variance and inconsistent with each other, the earlier description must prevail. Here the evidence has, in my opinion, established that what is described in the body of, and the schedule to, the conveyance of 1860 is entirely different from what is described by the map. If, as I assume, and as the plaintiffs contend, the map describes or includes the premises in dispute in this action, it follows, therefore, that the description by the map is *falsa demonstratio*, and must be rejected, and then the

plaintiffs' case wholly fails. In my opinion the description in the body of and the schedule to the conveyance of 1860 taken together is adequate and sufficient to describe what was intended to be thereby conveyed. This description comprises a reference to a known locality in which the premises referred to are situate; to the occupation of them by the representative of a known person (Theobald Lewis); to their measurement in front (43 feet); to a known street (Dublin-street), and to the rere (58 feet); to the yearly rent payable in respect of them (9s. 3*d.*), and the gale days, and to the tenure by which the tenant holds (by lease for 199 years from 1700). I think this description is as adequate and sufficient, to say the least of it, as the descriptions which were held to be adequate and sufficient in the cases of *The Dublin and Kingstown Railway Company* v. *Bradford* (1); *Roe* v. *Lidwell* (2); and *Dennehy* v. *Corrigan* (not yet reported save very briefly in 32 I.L.T., p. 82, but the judgments in which I have been supplied with (3)) I think it clear that the words, "and delineated in the annexed map" in the conveyance of 1860 are an additional description following an independent and particular description, and therefore, as soon as it is shown, as it has been, that the premises in the earlier description are not the premises described in the map, but are entirely different and distinct premises, the map, on the authority of the above, amongst other cases, must be rejected. In the second edition of Mr. Justice Madden's "Law and Practice before the Land Judges of the High Court" the cases on the principle of construction where there are inconsistent descriptions are cited at pages 71 and 72, and a distinction between the words "*as* described" and "*and* described" is referred to. Here the words are "*and described.*" I do not think it lies on the defendants, once they have shown that the premises in the earlier description are not the premises delineated on the map, to go on to show where exactly the premises in the earlier description are located. It has not been shown to my satisfaction that they cannot be located, and I think it is for the plaintiffs who claim them to find where they are located in fact, when it is shown that they are not what is delineated on the map. The plaintiffs' failure

(1) 7 I. C. L. R. 57. (2) 9 I. C. L. R. 184. (3) *Ante*, pp. 64–75.

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hitherto to find where they are located in fact may be largely due to their reliance on the map of 1860, and would be no justification for appropriating the property of other persons, which happens to be erroneously included in the map to the conveyance of 1860, under which the plaintiffs claim.

I therefore find for the defendants, and give judgment for them with costs, to be paid by the plaintiffs to the defendants who appeared, but, as I am unable to hold that there was any sufficient reason for the defendant, Robert Pelissier, appearing separately, there will only be one set of defendants' costs, unless there are costs, such as costs incurred in complying with any order obtained by the plaintiffs for discovery, which ought to be allowed separately.

Solicitors for the plaintiffs: *Whitney & Morris.*
Solicitors for the defendants: *Redington & Saintsbury.*

W. L.

K. B. Div. 1901. June 3, 4.

REX (CONNOLLY) *v.* JUSTICES OF THE COUNTY TYRONE (1).

Game laws—Prosecution for trespass in pursuit of game—Prosecution by gamekeeper as common informer—27 Geo. 3, c. 35 (Ireland).

A complaint for penalties for trespass in pursuit of game (27 Geo. 3, Ir., c. 35) lies at the suit of a common informer.

MANDAMUS. The Justices of county Tyrone, on the hearing at Petty Sessions of a complaint by Connolly against Clarke and others for trespass in pursuit of game on the lands of one Maguire, declined to entertain the case on the ground that they had no jurisdiction to do so, Connolly being a gamekeeper and not the owner or occupier of the lands in question, and therefore not entitled to prosecute. On appeal to the Chairman of Quarter Sessions,

(1) Before PALLES, C.B., and BARTON, J.

the Chairman held that the procedure on appeal provided by the Petty Sessions Act not having been complied with, he had no jurisdiction to entertain the appeal. The prosecutor now applied to make absolute a conditional order obtained by him, directed to the Justices of Petty Sessions, and to the Chairman of Quarter Sessions, to rehear the matter.

Drummond, K.C., and *P. L. Smith*, for the prosecutor, relied on *Midleton* v. *Gale* (1), *Morden* v. *Porter* (2), and *Kenealy* v. *O'Keefe* (3), as authorities showing that it was competent for a common informer to prosecute for penalties under the statute.

R. C. K. Wilson relied on *Powell* v. *Castletown* (4).

[Counsel also discussed *Bruce* v. *M'Alister* (5); *Cleary* v. *De Vesci* (6); *Crichton* v. *Brady* (7).]

PALLES, C.B.:— June 4.

In my opinion the magistrates were wrong in declining jurisdiction. It is entirely too late to make the point now suggested. The decision in *Midleton* v. *Gale* (1) in England in 1838 is one exactly in point, having regard to the statute 27 & 28 Vict. c. 67; and if we leave that statute out of consideration, and apply *Midleton* v. *Gale* (1) to section 10 of the Act Geo. 3 (Ireland), c. 35, the decision is stronger against the contention of the defendant. It is a great deal easier, under the Act of Geo. 3, to arrive at the conclusion that an informer can sue, than it would be under the English Act of Wm. 4, or the Irish Act of 27 & 28 Vict. c. 67.

Still, however that may be, *Midleton* v. *Gale* (1) was decided by the Queen's Bench in England in the year 1838, and was followed in England by the Court of Common Pleas in *Morden* v. *Porter* (2) who independently arrived at the same conclusion.

(1) 8 A. & E. 155.
(2) 7 C. B. (N. S.) 641; 28 L. J., M. C., 213.
(3) [1901] 2 Ir. R. 39.
(4) 30 L. R. Ir. 93.
(5) 8 L. R. Ir. 195.
(6) [1895] 2 I. R. 704.
(7) 27 Ir. L. T. R. 42.

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Palles, C.B.

Thus we have two Courts in England concurring in the same view; and these two cases have been cited in every text-book that has been since written upon the game laws or upon the duties of magistrates.

Well, the same point came before the Court here, in *Bruce* v. *M'Alister* (1), some twenty years ago; and, if the facts in this last case are similar to those in the case before us, there is an end of the matter, for *Morden* v. *Porter* (2), and *Midleton* v. *Gale* (3), were there followed.

In *Bruce* v. *M'Alister* (1) the complainant was not a landlord to whom the game was reserved by a written instrument. The only way, therefore, in which the decision could have been arrived at was by holding that Sir Hervey Bruce was entitled to prosecute as a common informer. A landlord out of possession, to whom game has not been reserved by a written instrument, is, at common law, in the same position as a common informer; and the real distinction is between a common informer and a party aggrieved. Trespass in pursuit of game is a grievance only to the person in possession of the lands, or entitled to the game; and, assuming that the landlord is not in possession, and not so entitled, he is not a party aggrieved.

In *Powell* v. *Castletown* (4) I am reported to have thrown some doubt upon *Bruce* v. *M'Alister* (1) during the course of the argument; but, when the decision of the Court came to be pronounced, it went not upon that ground, but upon the ground that the penalty was awarded in such a way that the conviction could not be sustained under the Act of Geo. 3. I have long since satisfied myself that there was no ground for the doubt I then expressed, and I am under the impression that, within the last two or three years, this point came again before the Court here, that this same doubt of mine was relied on, and that I then stated that I had satisfied myself that *Bruce* v. *M'Alister* (1) was properly decided.

(1) 8 L. R. Ir. 195.
(2) 7 C. B. (N. S.) 641; 28 L. J., M. C., 213.
(3) 8 A. & E. 155.
(4) 30 L. R. Ir. 93.

I desire to add, that the section of the Act of 27 Geo. 3, which gives a part of the penalty to the complainant, affords the strongest evidence that an informer can sue. It has always been so treated; and one of the considerations relied upon in many cases, as showing that a common informer cannot sue, is the fact that the penalty is appropriated in such a way that he cannot ever get a sixpence of it. *E converso*, where he does get a portion of the penalty, there is a strong argument the other way. I do not go into this part of the case, as all the authorities were recently considered in a judgment I gave in *Keneally* v. *O'Keeffe* (1).

Upon the whole, I have no doubt that the magistrates were wrong. They may have been misled by what was stated in the report of *Powell* v. *Castletown* (2), and, for this reason, we give no costs.

BARTON, J.:—

I concur.

Solicitor for applicant: *P. Gallagher.*
Solicitor for the Justices: *W. P. Moody.*

A. E. R. J.

(1) [1901] 2 I. R. 39. (2) 30 L. R. Ir. 93.

K. B. Div. 1901. April 29, 30. May 1.

THE KING (ATTORNEY-GENERAL) *v.* THE COMPANY "FREEMAN'S JOURNAL (LIMITED)," AND WILLIAM BRAYDON, EDITOR OF THE "FREEMAN'S JOURNAL AND NATIONAL PRESS" NEWSPAPER, IN THE CAUSE OF THE KING (ATTORNEY-GENERAL) *v.* PATRICK A. M'HUGH.

THE SAME *v.* M'SWEENY, EDITOR OF THE "EVENING TELEGRAPH" NEWSPAPER (1).

Libel—Contempt of Court—Pending proceeding.

Where the trial of a prosecution for seditious libel had been held, but the jury had disagreed, and it was intended (though not formally stated) that a new jury would be empannelled :—

Held, that the proceeding was still a "pending" one, and that it was a contempt of Court for a journal to criticise the proceeding.

An application for alleged contempt of Court committed by an incorporated company should be by motion, not for attachment, but to attend and answer in respect of such contempt.

MOTION for attachment for contempt of Court.

Mr. P. M'Hugh had been prosecuted at the information of the Attorney-General for Ireland, for seditious libels upon the administration of justice, and upon the jury by whom two men, Muffeny and Maguire, had been tried and convicted at the Sligo Winter Assizes, 1899. The circumstances under which the prosecution arose are more fully given in the report of the argument on demurrer to certain of the pleas filed by the defendant in answer to the information : [1901] 2 I. R. 569. M'Hugh was tried before the Right Hon. Lord O'Brien, L.C.J., and a jury of the county of Dublin, on the 9th February, 1901. The jury disagreed, and were discharged at a late hour on Saturday evening, the 9th February (2). On the 11th February (Monday), there appeared

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and BOYD, JJ.

(2) M'Hugh was again tried on the 18th April, 1901, before Lord O'Brien, L.C.J., upon the same charges, when a verdict was found in favour of the Crown. A note of the judgment pronounced by the Lord Chief Justice in passing sentence is appended at the end of this report, p. 94.

in the *Freeman's Journal* newspaper, and in the *Evening Telegraph* newspaper, articles entitled "jury packing," stigmatizing the prosecution of M'Hugh as "preposterous," and (in effect) misrepresenting the issue to be tried in the case. The articles complained of also contained reflections upon the Judge presiding at the trial (the Lord Chief Justice); but, in moving for the conditional order, the Attorney-General stated that he did not seek to ground it on any reflections made in the incriminated articles upon the action of the presiding Judge, as, no doubt, his Lordship would consider it beneath his dignity to notice such a matter. On the present motion, *O'Shaughnessy, K.C.* (for the *Freeman's Journal* Company), stated at the outset of the argument that he would deal exclusively with the grounds upon which the conditional order had been sought for and obtained, and declined throughout to refer to any of the reflections that had been made on the presiding Judge. Counsel for the editors (*Bodkin, K.C.*) declined at first to adopt this course, and stated that he deemed it expedient to refer to the article as a whole, including those passages which related to the action of the presiding Judge. Ultimately, however, counsel for the editors abandoned this line of discussion.

The Attorney-General (*the Right Hon. John Atkinson, K.C.*), *The Solicitor-General* (*Wright, K.C.*), and *Morphy*, for the Crown, submitted that the case was clearly one of contempt; that the disagreement of the jury did not terminate the proceedings; that they were still pending; and that everyone was bound, even without any formal notice, to accept that the case would be tried again before another jury.

O'Shaughnessy, K.C., *O'Brien, K.C.*, and *Muldoon*, for the *Freeman's Journal* Company, submitted that the trial was not pending; that the affidavit showed that it was *bona fide* believed that the case had terminated; and that, as the company had given explicit orders to their editors and staff not to comment on pending cases, there was either no contempt on the part of the Company, or at least no intentional contempt or disrespect on their part.

Bodkin, K.C., for the editors of the two journals.

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THE KING v. FREEMAN'S JOURNAL.

[The cases cited in argument are fully referred to in the judgments of the Court.]

Cur. adv. vult.

May 1.

LORD O'BRIEN, L.C J. :—

When the argument in this matter concluded yesterday the Court had arrived at an unanimous conclusion as to the course we should pursue; but, as questions of importance were involved, we thought it better to commit our reasons to writing, and accordingly reserved judgment until this morning. The application with which we have to deal was one by the Attorney-General to attach for contempt of Court the *Freeman's Journal* company, and the editors of that paper, and of the *Evening Telegraph*, for the publication of certain articles in these papers commenting upon the trial of Mr. M'Hugh.

It is, I think, expedient, before I state the effect of the impugned articles, to refer to the principles which guide our Courts when dealing with what is called "contempt of Court." Lord Blackburn has clearly explained what it means :—

> "The phrase contempt of Court" (says that distinguished Judge) "often misleads persons not lawyers, and causes them to misapprehend its meaning, and to suppose that a proceeding for contempt of Court amounts to some process of vindicating the personal dignity of the Judges and protecting them from personal insults as individuals. Very often it happens that contempt is committed by a personal attack upon a Judge or an insult offered to him, but as far as their dignity as individuals is concerned it is of very subordinate importance compared with the vindication of the dignity of the Court itself; and there would be scarcely a case in which any Judge would consider that, so far as his personal dignity goes, it would be worth while to take any steps; but there is another and much more important purpose for which proceedings for contempt of Court become necessary. When a case is pending, whether it be civil or criminal, in a Court, it ought to be tried, in the ordinary course of justice, fairly and impartially. When an action is pending in the Court, and anything is done which has a tendency to obstruct the ordinary course of justice, or to prejudice the trial, there is a power given to the Courts by the exercise of a summary jurisdiction to deal with and prevent any such matter which would interfere with the due course of justice, and that power has been exercised, I believe, from the earliest times the law has existed."

This is the language of Lord Blackburn. In the passage I have quoted he was conspicuously right when he stated that "there would be scarcely a case in which any Judge would consider that, so far as his personal dignity goes, it would be worth while to take any steps." This, indeed, is true. Of course, judges when personally insulted must, as they have often done, vindicate not their individuality, but the dignity of their position, and punish the offender; and they must be careful not to permit themselves to be disqualified from the discharge of their judicial duty by insult or defamation. It would, indeed, be a very anomalous state of the law if an offender, who had written an article defaming a Judge, and then came into Court and tried to insult him, could be permitted to say to that Judge, You have been defamed and insulted, and you are therefore incompetent to hear the case. It would come to this that a person who wanted to get rid of a Judge might do so by defaming and endeavouring to insult him.

This method of disqualification might be carried very far indeed. Of course, Judges are very reluctant to deal with matters which may affect themselves, but they must be very careful not to yield to contrivances, resorted to in order to disqualify and get rid of them. At the same time, if a Judge, in the infliction of punishment, acts vindictively because he has been assailed, he should, indeed, feel degraded, because in that case he would not only have done what was wrong, but he would have betrayed his own manliness as an individual and his dignity as a Judge.

Now, in considering the judgment we should pronounce, my brethren and I have rigidly excluded all personal considerations, and we have dealt with the case in the manner in which Mr. O'Shaughnessy, who was counsel for the *Freeman's Journal*, submitted, in his powerful and dignified address, it should be dealt with. We have rigidly excluded all personal references and considerations, and the question we have in the first place considered is, whether the articles which have been impugned were calculated to interfere with the course of justice; whether in the language of Lord Blackburn, "they had a tendency to obstruct the ordinary course of justice, or prejudice the trial." That the articles had this tendency, that they were calculated

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to prejudice the minds of jurors, was the submission of the Attorney-General. He excluded all references to the presiding Judge.

However, before I come to the arguments advanced on behalf of the *Freeman's Journal* and the editors, let me consider whether the articles had a tendency, and were calculated to interfere with the course of justice, and to prejudice the fair trial of the case by the jurors who were to try it. The case had been already tried, and had resulted in a disagreement of the jury. The venue where the case was tried, and where it was to be re-tried was the county Dublin. The jurors were to come from that venue, and in that venue the *Freeman's Journal* and *Evening Telegraph* have a wide circulation. The jury that disagreed was discharged on the evening of the 9th February, and on the following Monday the article in the *Freeman's Journal* was published. It is intituled, "Jury Packing," and in its first sentence it stigmatises the prosecution of Mr. M'Hugh as a "preposterous prosecution," and then throughout the article, wholly misrepresents the issue.

The substance of the accusation against Mr. M'Hugh was that he had imputed criminal misconduct to certain Protestant jurors who tried the case against Muffeny and Maguire; and the article in the *Freeman's Journal* dealt with his conduct as if the only thing he did was to denounce the action of the Crown in directing Catholic jurors to stand by. The impugned article not only stigmatised the prosecution of Mr. M'Hugh as preposterous, but it entirely misrepresented the issue. "Preposterous" was the term it applied to the prosecution, and the whole drift of the article was to make Catholic jurors believe that the charge against Mr. M'Hugh involved their rights as Catholics. This was plainly calculated to prejudice the fair trial of the case.

The article in the *Evening Telegraph* stated "that Mr. M'Hugh was not tried on the fair issue—that the Crown, by a system of pleading which, like the Act of Edward 3, dared not be used in England, prevented him from taking up this position of justification." This was a total misrepresentation of the case. The issue which was presented to the jury was decided, by the concurrent judgment of four members of the Court, to be the

legal and proper issue. There is a well-known passage in Lord Hardwicke's judgment in the case against the printers of the *St. James's Evening Post* (1), a passage which has met with the approval of the very highest legal authorities, including Lord Hatherley and the present Lord Chancellor of England. Lord Hardwicke, in the passage I have referred to, stated :—

> "Nothing is more incumbent on Courts of Justice than to prevent their proceedings from being misrepresented, nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard."

The real effect and drift of the incriminated articles was not merely to condemn the fact of Mr. M'Hugh being prosecuted at all, but to misrepresent the issue. This, in our judgment, was clearly a contempt of Court. I entirely adopt the language used by Mr. Justice Wright in the case of *The Queen* v. *Payne* (2). I referred Mr. O'Brien to it in the course of his most able and lawyer-like argument. In that case Mr. Justice Wright is reported to have said :—

> "I agree with all that the Lord Chief Justice (Lord Russell) has said, and I only wish to add that in my opinion, in order to justify an application to the Court, the publication complained of must be calculated really to interfere with a fair trial, and if this is not the case, the question does not arise whether the publication is so objectionable in its terms as to call for the interference of the Court. If the publication is found to be likely to interfere with a fair trial, a second question arises, whether, under the circumstances of the case, the jurisdiction which the Court in that case possesses ought to be exercised, not so much for punishment as for preventing similar conduct in the future. This is the rule which I wish to adopt with regard to applications of this nature."

Such is the language of Mr. Justice Wright, and I entirely adopt it. I am of opinion that the language of the incriminated articles was calculated to interfere with the fair trial of the case against Mr. M'Hugh.

But it has been very emphatically argued on behalf of the respondents that they had no intention to interfere with the course

(1) 2 Atk. 469. (2) [1896] 1 Q. B. 577.

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of justice. This argument cannot be allowed to prevail. The true question is, as Lord Blackburn said, whether what had been done had a tendency to interfere with the course of justice, or as Mr. Justice Wright said, were the words that were used calculated to interfere with the course of justice; and upon this point I think it well to quote a passage from a well-known judgment of Lord Romilly.

In the case of *Daw* v. *Eley* (1) he is reported to have said, when dealing with a case of alleged contempt of Court:—

> "The principle is quite established in all these cases, that no person must do anything with a view to pervert the sources of justice or the proper flow of justice; in fact, they ought not to make any publication or to write anything which would induce the Court, or which might possibly induce the Court or the jury, the tribunal that will have to try the matter, to come to any conclusion other than that which is to be derived from the evidence in the case between the parties, and certainly they ought not to prejudice the minds of the public beforehand by mentioning circumstances relating to the case. Now, if that is done with the intention of perverting the ends of justice, there is no question that the Court would stop it, and very often the Court will judge for itself what are the fair inferences to be derived from the publications which appear; but it must also go beyond this—it must stop the publication where the evident result would be to affect the administration of justice, though that might not have been the intention of the person who did it."

This disposes of the argument as to actual intention. It has been said that the editors believed the trial was no longer pending, and that therefore they are not amenable to the summary jurisdiction of this Court. We cannot at all adopt this reasoning. The prosecution was, in fact, still pending. To animadvert adversely upon the institution and character of a prosecution, to stigmatize it as preposterous, and wholly to misrepresent the issues involved in it, and to do this immediately after the disagreement of a jury, whilst public attention is fixed upon it, and the public mind, with reference to it, by reason of the excitement which an abortive trial has occasioned, is in a susceptible and malleable mood, seems to me clearly to fall within the definition of "contempt of Court." No doubt, the

(1) L. R. 7 Eq. 49.

belief that the prosecution is at an end is all-important in reference to punishment, as I more than once pointed out.

The case to which Mr. O'Brien, in his very able and lawyer-like argument referred, the *Metropolitan Music Hall* v. *Lake* (1), reported in the Law Journal, even if well decided, has no application to the present. The persons who were there sought to be held responsible did not know that legal proceedings had been even commenced; and there is in the self-same volume of the Law Journal a judgment of the present Lord Justice Stirling, in which he held that the printer of a newspaper could be made responsible in a proceeding against him for contempt of Court, although he had no knowledge of the contents of the incriminated article.

The contention that no contempt of Court was committed because there was a conviction on the second trial needs only to be stated to be refuted. If such a proposition was maintainable, the most deliberate attempt to obstruct the course of justice should go unpunished if it had not had the desired effect. In order to ascertain whether a contempt of Court has been committed, we must regard the incriminated article and the state of things which existed at the time of its publication. The mischief that has been done may be regarded as an element in determining what punishment should be inflicted, if any.

I now come to what I have all through considered to be the real question in this case—what punishment (if any) should be inflicted. I have considered this matter with the most anxious care, and, in considering it, I have regarded what I believe was the object of the motion on the one hand, and on the other the beliefs and action of the company and its editors. The company, of course, acts through its editors. Now, the object of the present motion was, if I may use the expression, protective and admonitory. I am satisfied that the object was to safeguard the administration of justice, and to give a warning that the fact that a jury has disagreed does not justify public journalists in commenting upon the case in which they have disagreed, as if that case was at an end.

(1) 58 L. J., Ch. 513.

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In my opinion the object of the motion has been fully attained. The administration of justice has been safeguarded. Neither the *Freeman's Journal* nor the *Evening Telegraph* repeated the offence of which they were guilty, and justice was done on the second trial. So much for the object of the motion.

Now, as to the respondents, it has been proved that the company gave directions to their editors not to comment on pending cases, and I am satisfied that the editors, though they were entirely mistaken, really believed that, when the jury disagreed, the prosecution was at an end. Taking these matters into consideration, whilst we are of opinion that a contempt of Court, in the sense which the law attaches to that expression, has been committed, and whilst we so adjudge, we impose no imprisonment or fine; but we desire very distinctly to point out that, if in the future there is a similar transgression, and those who transgress are severely punished, they will have themselves to blame.

GIBSON, J.:—

The prosecution against Mr. M'Hugh was for certain seditious libels in which certain jurors connected with a Sligo trial were named, attacked, and held up to odium. The jury having disagreed on February 9th, on the 11th, articles appeared in the *Freeman* and *Evening Telegraph*, in which the prosecution was treated as preposterous and unsustainable. The articles, which purport to attack what they describe as "jury-packing," pass over the fact that the main charge against Mr. M'Hugh was for attacking particular jurors. The defendants in their affidavits state that their practice is to abstain from comment on pending cases and from any attack on jurors empannelled.

A conditional order was at once applied for by the Attorney-General, who based his application on interference with a subsisting prosecution, and disclaimed resting it on any reflections on the presiding Judge. According to *Gray's Case* (1), scurrilous abuse of a Judge with reference to a concluded trial may be punishable as a contempt of Court. The exercise of contempt jurisdiction in such a case has been so rare that it has been regarded as obsolete, and no such ground has been relied upon as supporting the

(1) [1900] 2 Q. B. 36.

present application. The justification or excuse offered for the articles, which were clearly calculated to affect the trial of the case, is that it was honestly believed that the prosecution would be dropped, and that the case might be regarded as finally concluded. I accept the statement in the defendants' affidavits that such belief was *bona fide* entertained; but none the less were the articles a contempt. An abortive trial is the same in its legal consequence as no trial at all. The proceeding still remains pending and undetermined. Under certain conditions, and even perhaps from the lapse of time, the inference may be fairly drawn that a prosecution or action has been abandoned; but the mere fact of a disagreement does not justify such an inference. I can recall many cases in which after two and even more disagreements there has been a conviction, though no doubt the nature of the charge was different from that directed against M'Hugh. The articles were plainly contempts of Court if the prosecution was pending; and, though their *bona fide* belief that the prosecution was at an end may be available by the defendants as a palliation or excuse, it does not answer the contempt; there was no legal justification for such belief.

The case of *Metropolitan Music Hall* v. *Lake* (1) was urged as an authority that innocent intent—there was in that case ignorance that any proceeding was pending—might be an answer not merely to punishment but to the technical offence. No doubt in some cases ignorance may exclude the application of contempt, as where an order to hear a case *in camera* is made, and a journalist, *bona fide*, without being aware of such order, publishes the proceedings. But in such a case the contempt is not founded on any interference with the course of justice, but on the violation of an express order by the Court. Such order cannot be treated as disobeyed if its substance is not known. That a charge of contempt, such as we have here to deal with, cannot be always met by the plea of ignorance is shown by the *American Exchange Case* (2), where it was held that a printer or publisher who knew nothing of the matter printed could be committed for contempt. *M'Leod* v. *St. Aubyn* (3) and *Vizetelly* v. *Mudie* (4) are to the same

(1) 58 L. J., Ch. 513.
(2) 58 L. J., Ch. 706.
(3) [1899] A. C. 549, at p. 562.
(4) [1900] 2 Q. B. 170.

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effect. In many of the cases there seems to be some confusion between the offence and punishment of the offence. The essential object of this summary jurisdiction to commit for contempt is preventive—the protection of justice and of those connected with its administration, jurors, witnesses, etc., from external interference. Assuming that Mr. Justice Chitty's decision is correct, it has no application here, where the defendants knew that there was a prosecution which was legally undetermined. They believed mistakenly that the Crown would not proceed, but they had no legal grounds for such belief.

It was argued that the articles were innocuous, as the subsequent trial and conviction proved, and could not therefore be regarded as such an interference with justice as to constitute a contempt. This taken in connection with the defendants' mistaken belief may well be urged in mitigation, but it does not alter the legal quality of the act. The contempt was complete when the Conditional Order issued; and the subsequent result of the prosecution cannot of itself purge the offence.

I need not discuss the numerous authorities on contempt. The principle on which the Court acts is clear—the preservation of justice, and the protection, respect, and independence of its ministers. The jurisdiction is one which from its character requires caution and prudence in its exercise; and applications for a technical breach of the law, without any real necessity, or for the purpose of costs, are rightly discouraged. So far as the cases on this branch of law represent the decision and discretion of the Court in dealing with particular facts, they cannot be relied on as authorities, for, as Lord Halsbury says in *Simmons' Case* (1), no one case on facts can be regarded as an authority for another, and the books are full of examples where Judges have expressed their disapproval of the exercise of discretion by their predecessors. Thus in *Johnson's Case* (2) Lord Esher, M.R., disagreed with the action of Coleridge, J., in refusing an attachment; and in *Cooper* v. *Osprey* (3) the Queen's Bench dissented from the view of the Exchequer, who also declined to attach. *O'Doherty's Case* (4) cannot for this reason be taken as a binding authority to control

(1) [1892] A. C. at p. 208.
(2) 20 Q. B. D. at p. 73.
(3) 3 B. & S. 932.
(4) 5 Cox, 348.

the discretion of the Court. The Court treated the case as one of contempt, but declined to punish, as there had been no warning. Such a warning in many cases, as where the Court was not sitting, would be impossible; and, as the law is well settled, a paper which is guilty of contempt cannot escape the consequences by alleging the want of express caution. In *O'Doherty's Case* (1) there was no pretence of ignorance that the trial was to be proceeded with, and the Court adopted perhaps too lenient a view.

The last point made was that the Conditional Order asking for an attachment against the company was wrong. This was admitted; but in two cases, *Sheehy's Case* (2), where a fine was imposed, and *Borthwick's Case* (3), where a sequestration was issued, the form of the application was for attachment, and the Court dealt with the case on the merits, and punished for contempt accordingly. The proper form of the application should be, as in *Onslow's Case* (4), to attend and answer for contempt.

After much consideration, I have come to the conclusion that though the Conditional Order was properly obtained for what was a contempt substantially calculated to interfere with the course of justice, the case is not one for punishment, as the transgression was inadvertent. The defendants acted under the *bona fide* belief that the prosecution would be dropped. There has been no repetition of the offence, and the second trial was not abortive. As to costs, the Crown if defeated, is not liable for, and if successful, does not get, costs.

BOYD, J.:—

I agree.

Solicitor for the Crown: *Sir P. Coll.*

Solicitor for the *Freeman's Journal*, Limited, and Messrs. W. Brayden and M'Sweeney: *Scallan.*

A. E. R. J.

(1) 5 Cox, 348.
(2) 26 Ir. L. T. R. 47.
(3) Unreported. K. B. D. (Ir.), February, 1901.
(4) L. R. 9 Q. B. 219.

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ON the 22nd April, 1901, in passing sentence on the traverser, the Lord Chief Justice made the following remarks:—

Patrick Aloysius M'Hugh, you have been found guilty, by a jury of your country, of publishing not only one, but three seditious libels: one on the 16th of December, 1899; another on the 10th of February, 1900; and the third on the 7th of April, 1900. In the propriety of the verdict of the jury I entirely concur: no fair and candid man who heard the evidence could in any way question the propriety of the verdict. It now becomes my duty to pass sentence; and I have considered with great care, indeed, I might well say, with great anxiety, what that sentence should be. The determination of the sentence he should impose is often the most difficult and anxious part of a Judge's duty. Before I pass the sentence which I think the offences of which you have been found guilty deserve, I will shortly recapitulate the facts which led to your prosecution.

At the Connaught Winter Assizes of 1899, two men, named Muffeny and Maguire, were put on trial before my brother Andrews and a jury of the county of Sligo, on a charge of conspiracy to compel, by intimidation, a man named Hughes to surrender a certain farm. The farm had been held by a man named Feeney, who had been evicted for non-payment of rent. He owed, at the time of his eviction, nearly five years' rent. After Feeney was evicted, Hughes paid the landlord £15, and got from the landlord possession of the farm; and the rent was reduced from £10 to £7 10*s.* a year. Hughes, it would appear, promised Feeney to give him over possession of the farm, if he, Feeney, paid him the £15 which he had paid the landlord. Feeney did not pay the £15, and Hughes continued to remain in possession. In this state of facts, and in reference thereto, meetings were held in the county of Mayo, at which many denunciations were indulged in. Hughes was denounced because he did not give up the farm. He stated that he was willing to surrender it if he were paid the £15; but though this sum was not forthcoming, he was denounced in the most unmeasured language. At a meeting held at a place called Knockamore, these two men, Muffeny and Maguire, denounced and stigmatised him as "a viper," "a reptile," "a vampire," "a miserable wretch," "a wolf in sheep's clothing," as "an evil spirit." It was stated that it would be a thousand times better for him that he were dead. At this meeting at Knockamore, when he was thus denounced, Hughes offered to give up the farm if he got the £15 which he had paid the landlord; but Maguire, one of the men who were tried before my brother Andrews, told him, with an accomplished cynicism, "that he would get every fair play, but no money." The wretched man had, in the end, to surrender his farm; and from that time to this he never received one penny of his £15. Muffeny and Maguire, who so denounced him, were put

on their trial for conspiring to compel him, by intimidation, to give up his farm. At the trial, before Mr. Justice Andrews, all that I have mentioned was, amongst other matters, proved against them. The man Hughes was himself examined as a witness, and evidently presented the most abject spectacle of craven fear. He showed how thoroughly he had been intimidated. He tried to go back of what he had stated to the police; and though, before the trial, he told them he would not have given up the farm but for the meeting at Knockamore, he, nevertheless, stated at the trial that he had nothing to complain of in reference to the meeting at which he had been openly denonnced in such unmitigated terms. His demeanour and statements before the jury were clearly indicative of the lengths which intimidation had reached. No witness was called for the defence. The evidence given on behalf of the prosecution was wholly uncontradicted. Counsel cross-examined the police as to the notes they took of what had been said at the meeting; but not one of the multitude of persons who assembled at Knockamore, and who were estimated at about nine hundred, was produced to contradict them. It was said that Hughes had yielded to "moral suasion"; but stigmatising and denouncing a man as "a viper," "a vampire," "a reptile," "a scabby sheep," "a miserable wretch," "an evil spirit," declaring "it was better for him that he was dead," and refusing to pay a poor man a debt which was justly due to him, are not precisely the methods of moral suasion. The jury who tried Muffeny and Maguire, if they had any respect for their oaths, had no alternative but to convict them; and my brother Andrews, a most careful Judge, said he felt justified in imposing upon them a sentence of six months' imprisonment.

Now, this was the trial, and these were the facts, in reference to which you published the libels of which you were found guilty. Let us now see what these libels were.

In the issue of the *Sligo Champion* of the 16th of December, when animadverting upon the trial of Muffeny and Maguire, and upon the action of the jurors who tried them, you used the following language:—"Yet we have the Crown and twelve Protestant jurors—whose verdict looks as if given by order, when it was so clearly anticipated—declaring as criminal the action of Messrs. Muffeny and Maguire, in condemning what Hughes himself practically admitted deserved condemnation. Could there be a greater mockery of justice, or a greater farce played by a Government which thinks its so-called law, as embodied even in such a minion as a removable magistrate, not sufficiently respected sometimes. But such is English rule in Ireland, aided by the hacks of Dublin Castle, and by a certain section of bigoted, intolerant, narrow-minded, ignorant Tories, who are ever ready to become willing tools to perpetrate a dirty job at the beck of Dublin Castle. Unfortunately, our town and county furnish a small section of such Protestants. It is singular that whenever the Castle has a 'job' to do, it relies with confidence on these bigots; and as events here have so often proved, they are never disappointed."

What was all this? Was it not a very clear and explicit statement that

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the jurors who tried these men were the corrupt and servile tools of a corrupt system; that they disregarded their oaths and their duty, and prostituted their consciences, in order to pander to the cruelty and oppression of those who empanelled them? And all this was with reference to a trial in which there was no alternative but to convict, in which the evidence was all one way, and in which not one of the prisoners' friends came forward to defend them.

I turn now to the second libel, which was published on the 10th February, 1900. This was a report of a speech made by a Mr. O'Donnell, who was described at the trial as a salaried Organiser of the "United Irish League." It was inserted in the *Sligo Champion* not as a mere report of a speech: the publication of it was part of a system of vilification and denunciation. It was published clearly with the intention of defaming the administration of justice, and of vilifying the jurors who tried Muffeny and Maguire. What, then, was the speech? In so many words it alleges that the men who were convicted were not guilty of any crime; that they were sent to Castlebar Jail by a packed jury; that the members of the jury were not worthy of the respect, patronage, or friendship of their neighbours; that they should be taught a lesson in each district; that they had brought in a verdict of guilty in a case where the offence charged was a crime only according to the ideas of English law; that the people should "have at them again," in obedience to a previous incitement couched in the language, "Have at them again, boys": that the jury were perjured, partisan Orangemen in the county of Sligo, who did the bidding of Dublin Castle, and were the worst enemies of the people; that the jurors were not to be styled men, but ruffians, who did the dirty work of Dublin Castle in Sligo Courthouse.

This was the speech. Could anything be worse than this? Yes; perhaps the third libel was worse. It was published on the 7th April, 1900. What did it consist of? It consisted of a list of the names of the jury who were stated to have done the bidding of Dublin Castle. All the names were set out; all the names of the members of what was described as "a Packed Jury," and they were stated to have "done the bidding of Dublin Castle." Why were the names given? Plainly, that the jurors might be boycotted, and continue to be the objects of opprobrium and hatred. I said before, I say now, that the journalist who holds up jurors by name to public odium and hatred incurs a grave responsibility indeed. We all remember what took place when a juror was struck down in the streets of Dublin.

What was the defence attempted for all these grievous imputations? The defence sought to be set up was that Catholic jurors were ordered to stand by. The imputation made was that the Protestant jurors were corrupt, and had violated their oaths. What possible relevancy to this imputation had the allegation that Catholic jurors were directed to stand by? None whatever. The fact that jurors who were directed to stand by were Catholics could be no possible justification for the allegation that Protestant jurors had violated their oaths and acted corruptly. Of the twenty-two jurors who were directed to stand by,

Mr. Tarrant, who was the solicitor for the defence, stated at the first trial that he believed seventeen were members of the "United Irish League." On the second trial he asserted that he believed there was an error in this statement, and that, as far as he knew, only four or five of the jurors were members of the League. But all this was absolutely irrelevant to the charge made.

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What sentence, then, am I to impose? A public journalist has, and undoubtedly ought to have, a wide privilege of commenting fully, candidly, and vigorously, upon the proceedings of a Court of Justice; but, under the pretence of complaining that the right of the Crown to direct jurors to stand by has been oppressively exercised, he must not impute criminal misconduct to jurors; he must not endeavour to terrify them into giving verdicts of acquittal, and thereby seek to frustrate the law, and procure immunity for wrongdoers.

Patrick Aloysius M'Hugh, I sentence you to be imprisoned for six calendar months from this date, without hard labour. I impose a concurrent sentence in respect of each count of the information, so that you shall be imprisoned, in all, for a period of six months, and no more. The Irish Prisons Act, 40 & 41 Victoria, directs that every prisoner under sentence for seditious libel shall be treated as a misdemeanant of the first division. I accordingly direct that, during your sentence, you shall be treated as a misdemeanant of the first division. I long and anxiously considered what sentence I should impose. The sentence I have imposed appears to me, having regard to the nature and character of the libels you published, a lenient one. But it must be remembered that this is the first sentence that, for many years past, has been imposed in this country for seditious libel, and that a sentence is not only a punishment but a warning, and that if the warning is disregarded the punishment should be more severe.

GRANT *v.* LYMBERY AND OTHERS (1).
(1900. No. 9890.)

Land Law (Ireland) Act, 1881, *s.* 21—*Fishery Act*, 1842, *s.* 19—*Stake-net weirs forming part of holding.*

Two stake-net weirs were, under the Fishery Act, 1842 (5 & 6 Vict. c. 106), section 19, legally erected in the tidal waters of the river S. by the lessee in occupation of adjoining lands. The lands, apart from the weirs, were admittedly agricultural or pastoral in their character; but, upon the expiration of the lease, on the 26th September, 1899, the weirs were, and had been for many years, by far the more valuable portion of the holding. Ejectment proceedings having been instituted by the lessor upon the expiration of the lease, the lessee claimed to be entitled to continue in possession as tenant under the Land Law (Ireland) Act, 1881, sect. 21:—

Held, that the right to erect the weirs under the section was given to the lessee as occupying tenant; that it only continued during such occupation

(1) Before PALLES, C.B., and JOHNSON and KENNY, JJ.

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and that the lessor was entitled to resume possession of the entire holding, including the weirs.

MOTION by one of the defendants, Mary Angela O'Neill, to have the verdict and judgment, entered for the plaintiff at the trial, set aside, and to have judgment entered for her, or to have the verdict set aside on the ground that it was against evidence and the weight of evidence, and for a new trial.

The action was brought to recover part of the lands of Knockboy in the county of Waterford, with the slob-land, foreshore, and soil and bed of the river Suir, and the lands covered with water bounding said lands, lately held by the defendants from the plaintiff under a lease expired, dated the 28th September, 1796, and for mesne profits.

By lease dated the 28th September, 1796, the lands in question were demised by Pierce Barron Thomas Quain to James Power and his heirs for three lives and thirty-one years from the death of the survivor, and by sub-lease dated the 29th August, 1818, twenty acres adjoining the river Suir of the lands comprised in the head lease were demised by Edward Power and Thomas Canty, as middlemen, to Patrick Lannon, as trustee for the predecessor in title of the defendant, Mary Angela O'Neill, for the same lives, and twenty-nine years from the death of the survivor at the yearly rent of £28 5*s.*, late Irish currency. Arthur O'Neill, through whom the defendant Mary Angela O'Neill derived, after acquiring the interest in the sub-lease by assignment of 1853, erected two stake-net weirs in the tidal waters of the river Suir, adjoining the lands under the Fishery Act of 1842 (5 & 6 Vict. c. 106, sect. 19).

An inquiry as to the legality of these weirs under the Fishery Act, 1863 (26 & 27 Vict. c. 114), was held by the Special Commissioners of Irish Fisheries in the year 1865, and resulted in an order condemning the weirs on the ground that the consent of the middlemen Power and Canty to their erection was insufficient to make them legal. This order was reversed upon a special case by the Court of Queen's Bench on the 18th February, 1867, and the weirs were declared to be legal under the 5 & 6 Vict. c. 106, s. 19. The weirs were continually fished up to the date of the bringing of this action, and though the lands were of good quality, were now

by far the more valuable portion of the subdemised premises, their annual value being approximately £150. The Secretary of the Waterford Harbour Commissioners proved that negotiations for the dredging of the channel, with the sanction of the Board of Trade, had fallen through owing to the impossibility of coming to terms with the occupying tenant, Mary Angela O'Neill, who claimed £5000 for injury to the fishery. The negotiations were standing over pending the ascertainment of who was entitled to the weirs.

It was admitted that the head lease had expired on the 26th September, 1899, the last life (Roger Sweetman) having died on the 26th September, 1868, and that the plaintiff was entitled to an immediate estate in possession on the expiration of that lease. It was further admitted that the sub-lease of 19th August, 1818, had expired two years previously, and that the tenant, Mary Angela O'Neill, was entitled to the interest, if any, of the occupying under-lessee. From the expiration of the under-lease to the expiration of the head lease, the occupier, as tenant overholding upon the terms of the sub-lease, after its expiration, continued to pay the same amount of rent as thereby reserved to the middlemen.

Those defendants who were sued as tenants under the head lease allowed judgment to go by default. The sub-tenant, Mary Angela O'Neill alone, took defence, and in addition to the defence alleging possession she pleaded that at the expiration of the lease she was in occupation of the lands as tenant from year to year, and that the lands were an agricultural holding within the Land Law (Ireland) Act, 1881, and that the tenancy was binding on the plaintiff and undetermined, and that the fishery weirs claimed were not, nor were any part thereof, erected on the lands.

It was admitted on the part of the plaintiff that, apart from the weirs, the lands of the holding, so far as it consisted of land, would be agricultural or pastoral.

The action was tried before Lord Justice Fitz Gibbon and a special jury on March 9th, 1901, at Waterford.

The following were the questions left to the jury and their answers :—

(1) Is the holding an agricultural holding within the meaning of the Land Law (Ireland) Act, 1881 ?—The lands are agricultural ; the weirs are not.

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(2) At the expiration of the lease on the 26th September, 1899, were the weirs part of the holding?—Yes.

(3) If so, were they a distinct and substantive part of the property then held under the lease?—Yes.

(4) What is the amount of mesne rates (if payable), which is the value of (*a*) the land, and (*b*) the weir, from the 26th September, 1899, to 17th July, 1900, the date of the writ?—Answer (*a*) the land, £17 10*s.*; (*b*) the weirs, £55.

Upon these findings the Judge entered a verdict for the plaintiff with £72 10*s.* mesne rates, and gave judgment for the plaintiff accordingly for the possession and mesne rates.

Ronan, K.C. (with him *Cherry, K.C.*, and *Battersby*), for the defendant, M. A. O'Neill:—

Where the original subject-matter of the demise continues in its original state, another subject-matter of the demise cannot be imported into it so as to alter its character. If a tenant having a farm of land subject to a lease encroaches upon the adjoining waste land not the property of the Crown, and incorporates that with his holding, he thereupon may make it part of his holding, and may make it subject to his lease. But that doctrine is confined to a tenant wrongfully acquiring waste land, and has never been applied to Crown property. Encroachment is stealing, and the principle of law is that if the tenant manages to steal waste land, he steals it for the benefit of his landlord. Can it be contended that the covenants in the lease apply to this fishing right? If not, in what way does it become part of the holding? I say that it is a holding in itself. The findings of the jury are instructive upon this point: "Is the holding an agricultural holding? The land is agricultural; the weirs are not." That is to say, the original thing was not modified at all, but the holding consists of two integral parts, the lands and the weirs, one integral part being agricultural, and the other not. It is not that the lands are modified by the weirs, but that there has been a definite integral addition, and that that addition is not agricultural or pastoral.

The plaintiff has, therefore, shown no title to the slob land, foreshore and soil and bed of the river Suir, and the lands covered with water, and he must succeed by the strength of his own title. The tenant has an absolute right of disposition over

the entire of this right of fishing, as if he got it by grant from a third person, and not by statute: *Vandeleur* v. *Malcolmson* (1). Encroachment is out of the case, and there is no evidence to support the finding of the jury that this incorporeal right was part of the holding. The defendant is entitled to judgment.

[He referred to *O'Neill* v. *Maguire* (2); *Vandeleur* v. *Malcolmson* (1); *Griffen* v. *Malcomson* (3); *Lancaster* v. *Eve* (4); *Queen (O'Brien)* v. *Justices of Tipperary* (5); *Irish Society* v. *Crommelin* (6), and *Wall* v. *Eyre* (7).]

Samuels, *K.C.*, and *Wakely*, *K.C.* (with them *Rylands*), for the plaintiff:—

When you have weirs erected by a person in occupation of lands, they become an easement attached to the holding, and an improvement on the holding which there is a covenant to yield up at the expiration of the term. Part of the weir is on the land, and we claim the soil of that; part of it is in the bed of the river, and that we claim as appurtenant. The jury have found that it was a substantive part of the demise, and there is evidence to support that finding. On the special case it appears that it was only by virtue of her occupancy and tenancy that the tenant ever acquired this right at all. Under the 19th section of the Fishery Act, 1842, the whole right turns on occupancy. If this right was acquired by the tenant, by virtue of his actual tenancy and occupation, and if it is a *profit a prendre*, or right annexed to that occupancy, is it not a distinct and substantive part of the holding under the demise? We contend that it is an incorporeal hereditament, and a substantive part of the holding, and the defendant is not entitled to succeed on the plea that, under the Land Acts, she is entitled to possession. [They referred to *O'Neill* v. *Maguire* (2); *Ex parte Hutchinson* (8); *Lancaster* v. *Eve* (4); *Vandeleur* v. *Malcolmson* (1); *Crocker* v. *Fothergill* (9); *Wall* v. *Eyre* (7); *Leonard* v. *St. Ledger Barry* (10); *Boyle* v. *Forster* (11).]

(1) 17 I. C. L. R. 569.
(2) I. R. 1 C. L. 579.
(3) 11 Ir. Jur. (N. S.) 436.
(4) 5 C. B. (N. S.) 717.
(5) 4 L. R. Ir. 259; 6 L. R. Ir. 129.
(6) I. R. 2 C. L. 324.
(7) 32 L. R. Ir. 475.
(8) 12 L. R. Ir. 79.
(9) 2 B. & Ald. 652.
(10) Mac D. L. C. 240.
(11) 30 L. R. Ir. 623.

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Cherry, K.C., in reply :—

The position we take up is best defined in the words of O'Brien, J., in *Vandeleur* v. *Malcolmson* (1), at p. 578, "The policy of those" (the Fishery) "Acts was to prevent the erection of illegal weirs or nets; but where the original erection of the weir was legal, I do not see any ground for saying that it was part of the policy of the Act to prevent the parties rightfully entitled to such weir or net from exercising over it the same right of disposition as they would have over their other property, and as they would have in regard to property of the same description, viz. a right of fishery, if they had acquired that right under other circumstances than under the 19th section of the 5 & 6 Vict. c. 106." Rights of voters under the Franchise Acts, and rights of publicans under the Licensing Acts, &c., are all personal rights of the occupier, and have nothing to do with the landlord. *Wall* v. *Eyre* (2) has no bearing on this case, because the tolls were expressly demised with the lands.

June 11.

PALLES, C.B. :—

This is an ejectment on the title, brought by a landlord on the determination of a lease of 28th September, 1796, which expired on the 26th September, 1899. Defence has been taken by a subtenant of part of the lands, who insists that her holding is an "agricultural" one within the Land Law (Ireland) Act, 1881. If it were, admittedly the tenancy, as to her, would have continued to subsist, and the defendant would be entitled to judgment. Thus, the question for decision is, was the holding, upon the 22nd of August, 1881 (the date of the passing of the Act), "agricultural"?

The holding adjoins the estuary of the river Suir, and, as far back as 1820, and thence continuously until the expiration of the lease, two stake-nets for catching salmon were attached to the foreshore of that river adjoining the holding, and were erected and used by the persons in occupation of the holding under the lease. After the passing of "The Salmon Fishery (Ireland) Act, 1863" (26 & 27 Vict. c. 114), there was much litigation as to the legality of these nets, and ultimately, by an order of the Court of Queen's

(1) 17 I. C. L. R. 569. (2) 32 L. R. Ir. 475.

Bench of the 18th February, 1867, they were declared to be legal under sect. 19 of 5 & 6 Vict. c. 106, and some short time afterwards they were, in pursuance of that order, certified accordingly by the Commissioners under that Act.

The holding has been found to be "agricultural," on the assumption that those nets are not included in it. Thus, the solution of the matter in controversy depends upon two questions, viz. (1), are the weirs to be treated as being comprised in the holding? and (2), if so, what effect, if any, has that circumstance on the character of the holding?

As to the first matter, it has been found by the jury that the nets are comprised in the holding. But as that question is either entirely one of law, or principally depends on matter of law, I do not attribute any force to this finding as against the defendant.

The 5 & 6 Vict. c. 106, sect. 19, under which the legality of the nets was established, enacts: "That it shall and may be lawful for every person who shall hold and *occupy* as tenant . . . under any lease for a life or lives . . . any land adjoining . . . any estuary . . . to fix or erect such stake-net or other fixed nets as aforesaid attached to that part of the shore adjoining such land." The section then contains two provisoes. The first prohibits tenants for certain limited estates from erecting such nets, without the previous consent, in writing, of the chief landlord or lessor, and the second provides that the erection of any such nets shall not give any right to the *occupancy* of the shore, "except for the purpose of attaching the said fixed nets thereto during such occupancy of the land as aforesaid."

The words of this section make it clear that the right to erect the nets thereby given is so given to the specified occupying tenant as such; that it continues in him only during his occupancy as tenant; and that on the termination of the tenancy, and the resumption of the occupation by the landlord, it reverts to the landlord as such.

Had the lease been executed after the passing of the 5 & 6 Vict. c. 105, and after the erection of the nets, and had the nets or the right to erect them been expressly demised, it could not have been contended that they were not comprised in the lease, and even had there not been an express demise of the nets,

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as the statutable right is given to the tenant as such, he would, in the case I have supposed, have acquired it under the lease, as a *quasi* statutable appurtenance, and it would be part of the "holding," within the meaning of the Act of 1881.

No distinction, in principle, can be drawn between the latter case and the present. In each a fishing right is acquired through the combined effect of the lease and the statute, and in each case it is so acquired by the tenant as such. I therefore cannot entertain any doubt that the fishing rights must be deemed to be part of the holding.

Much reliance was placed by Mr. Ronan upon some expressions of O'Brien, J., in delivering the judgment of the Court in *Vandeleur* v. *Malcolmson* (1), to the effect that a valid alienation of the right of fishing alone, *i.e.*, without the adjoining land, to which it was appurtenant, would not render the net illegal. By these expressions, having regard to the matters in controversy here, I understand it was meant that if, during the open season of 1862, the net was vested in a person who was not in occupation as owner or tenant of the adjoining land, the net might still have been "legally erected" during the open season of 1862, within the meaning of 26 & 27 Vict. c. 114, sect. 4. The proposition so enunciated is stated by the learned Judge not to have been necessary for the decision in the case then before the Court, and as I am of opinion that it is not necessary to decide it here, I say no more than that at present I am unable to assent to it. I say that it is not necessary to decide it here, because, even if the tenant might, notwithstanding the statute, have legally aliened, and during the lease had in fact aliened, the agricultural land to one person, and the fishing rights to another, both land and fishing rights would have continued to be held under the one lease, and both together would have constituted "the holding" under the Act of 1881.

This brings me to the second question—What effect on the character of the holding has the fact that the fishing rights are comprised in it?

As to this, it has been insisted for the plaintiff that the fishing

(1) 17 I. C. L. R. 569.

rights are to be treated as a subject matter distinct from the land, as were the tolls in *Wall* v. *Eyre* (1), so that, unless the value of those rights was so insignificant that they might be treated as non-existent, a fair rent could not, prior to the Act of 1896, have been fixed in respect of the "holding."

I do not agree in that contention. This fishing right is not a distinct subject matter. It is, as I have already stated, an appurtenance to the land, and is to be viewed in relation to the character of the holding as a whole.

I base my judgment upon the relative values, as found by the jury, of the fishing rights, and of the land without those rights, viz., £55 and £17 10*s*. The real value of the holding, the value which, but for the Land Act, would have been taken into account between the parties in bargaining for the rent on a new letting, the value which, if the holding is within the Act, should be ascertained by the Land Commission in the fixing of the fair rent is, and as I infer was, in 1881, its value as a holding comprising fishing rights. In the view of intending lessors and lessees, the principal thing which would be acquired under a demise of the holding would be the fishing rights; the land would be deemed merely as accessorial thereto. Such a case is within the principle of *Carr* v. *Nunn* (2), and *Doyne* v. *Campbell* (3).

As to the form of the judgment, it appears to me to be too wide. It includes, in the lands of which it directs the plaintiff to be put into possession, part of the foreshore of the estuary. This has arisen from some clerical error. I have communicated with Lord Justice FitzGibbon, and he informs me that at the trial he ruled, without objection by either party, that the plaintiff had not given any evidence of title to this portion of the premises included in the writ. We must, therefore, direct the verdict and the judgment to be amended by excluding it.

The plaintiff, however, is entitled to recover, in addition to the land, the incorporeal rights annexed to it. In *Crocker* v. *Fothergill* (4), cited by Mr. Wakely, Holroyd, J., said that although an ejectment would not lie for a liberty and privilege alone, which is

(1) 32 L. R. Ir. 475.
(2) I. R. R. & L. 89.
(3) I. R. 9 C. L. 95.
(4) 2 B. & Ald. 652.

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a mere incorporeal hereditament, yet when it "is brought for land, and liberties and privileges are appurtenant to the land, the latter may be recovered with the land, because you may recover in the ejectment all incorporeal things included in the demise, although an ejectment will not lie for the incorporeal things alone."

We, therefore, refuse the defendant's motion, with costs, and order that the verdict and judgment be amended, by excluding therefrom the portion of the foreshore mentioned therein, and by adding to the description of the land the words, "together with the right to erect and keep erected the two stake-nets attached to that part of the shore of the estuary of the river Suir adjoining the said lands."

The plaintiff must bear his own costs of the amendment.

JOHNSON, J. :—

The plaintiff's predecessors in title in 1796 demised about 130 acres of land in Co. Waterford for three lives and thirty-one years from the death of the survivor. The lessees in 1818 subdemised about 20 acres of these lands for the same lives, and twenty-nine years from the death of the survivor. The lands so subdemised adjoin the estuary of the river Suir, where the tide ebbs and flows, and where the ebb leaves a foreshore. The plaintiff, who is the reversioner on the lease of 1796, instituted the present ejectment on title against all the defendants in July, 1900. After the expiration of the lease of 1796, Mrs. O'Neill, the only defendant who has taken defence, was before and at the expiration of the sub-lease (which expired two years before the expiration of the lease of 1796) beneficially entitled to the estate and interest demised by the sub-lease, and her defence, besides the ordinary defence of possession, is that, on the expiration of the sub-lease, she remained in *bona fide* occupation of the sub-demised land, as tenant from year to year to the assignees of the lease of 1796, that her land is an agricultural holding within the Land Act, 1881, and that her tenancy is now binding on the plaintiff and undetermined, and that no part of the weir in question is or ever was on the sub-demised land. I find no evidence that she became such tenant from year to year on the expiration of the sub-lease, though she remained in possession.

The weir in question, which is a Scotch weir stake-net, is not mentioned in either the lease of 1796 or the sub-lease of 1818, but it is in evidence that, prior to 1820, a weir existed on the site of the present weir, and was probably of the same construction. Stake-nets, commonly called Scotch-weirs (though weirs of somewhat similar construction were known in Ireland as far back as 10 Car. 1, c. 14, Ir.) were, I think, introduced into Ireland by Halliday, a Scotchman, shortly after the end of the war in 1815, and speedily got into common use. Their construction is described in *Reeves* v. *Robinson* (1). The land-end of the net is made fast to the shore. The numerous contentions which arose about the legality of these nets were set at rest by the Act of 1842, 5 & 6 Vict. c. 106, sect. 19, which authorised (*inter alios*) "every person *who shall hold or occupy as tenant* for a life or lives *any land adjoining* the sea-shore or *any* estuary" (not within the limits of a several fishery) "to fix or erect such stake-net *attached to that part of the shore adjoining such land.*" The then assignee of the sub-lease *being a tenant* so qualified (as decided in *O'Neill* v. *Maguire* (2)), erected the stake-net in the present case, and obtained the necessary certificate of his statutory right to do so from the Special Fishery Commissioners under the Act of 1863, 26 & 27 Vict. c. 114. The Act of 1842, sect. 19, further provides that "the placing or erection of such stake-net shall not give or confer any right or title to the occupancy of the said shore (except for the purpose of attaching the said fixed net thereto *during such occupancy of the land as aforesaid*)". Language can hardly be plainer. The statutory right or privilege of erecting the fixed net is given only to the person *who shall hold and occupy as tenant* (having the prescribed estate), *land adjoining* the estuary, and *during such occupancy of the land.* The decision of the Queen's Bench in *O'Neill* v. *Maguire* (2), and the certificate of the Special Commissioners, legalised the stake-weir in question at that place in the estuary, and a tenant, who during her tenancy, exercises a statutory right or privilege as such tenant, by virtue of her tenancy, cannot at the end of her tenancy turn round and say, that right or privilege was so

(1) I. R. 3 C. L. 472, 474. (2) I. R. 1 C. L. 585.

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legalised to her individually, and is not in terms in her sub-lease, was no part of her subdemise, but is outside and no part of her tenancy. The underlying principle is (as it appears to me) stated by Charles, J., in *Tabor* v. *Godfrey* (1). That was a case of encroachment, but the principle which underlies the judgment of that learned Judge is of far more general application than merely to the particular doctrine of encroachment. That learned Judge says: "The principle is that a man who gets in by reason of being tenant must take land" (which was the subject-matter of that action) "as under his original take. That is the reason why it is said that a tenant who has occupied an encroachment has occupied for the benefit of his landlord. It is said that principle cannot apply during the currency of his tenancy, but I believe it has been so applied, and I think it does apply to a tenant who so occupies during the currency of his tenancy. The principle is that he comes in, and has it as part of his take, and although the lease excludes it, yet by the way in which the landlord has permitted him to occupy, the encroachment must be taken as included in the demise." In the present case the statutory right or privilege was conferred on the tenant, *qua* tenant, holding and occupying the land as such tenant during her occupancy as such tenant, and in my opinion from the date of the Commissioners' certificate of the legal right to erect and use the net, that right or privilege became, and was, an incorporeal right or privilege appurtenant to the land enjoyable by the tenant during her tenancy as part of the original demise, and no longer; and, being so appurtenant to her holding, it reverts with the holding to the reversioner on the termination of the tenancy. The result is that this holding at the time of the passing of the Land Act of 1881 was a holding partly agricultural and partly (and by far the most valuable and substantial part) an incorporeal right to a salmon-fishing fixed net, appurtenant to and therefore part of the holding. As to what Mrs. O'Neill's position may be in the Land Court, if she shall institute proceedings there, I offer no opinion—that is a question which the Land Commission will decide—but as the case stands at present, I

(1) 64 L. J., Q. B. at p. 247.

think the learned Lord Justice was perfectly right at the trial, and that the verdict and judgment for the plaintiff should stand. The judgment has been entered too widely, and will be amended on the record, as mentioned by the Chief Baron. See Furlong's Landlord and Tenant, p. 1019.

KENNY, J. :—

The consideration of this case involves a question which seems to me to be one of first impression. We have not been referred to, nor have I been able in the interval since the close of the arguments to discover, any authority in which the character of a "holding"—within the meaning which that word has acquired under the Land Acts—was held to be affected by an easement appurtenant to it. The cases which appear to most nearly approach in principle the present one are *Lindsay* v. *Kennedy* (1) and *Wall* v. *Eyre* (2). In the former there was a valuable quarry of building-stones on the holding, and the tenant paid an additional rent of £10 for the privilege of working it. The entire holding consisted of 32 acres, held at a rent of £25 a-year, exclusive of the £10 for the right of quarrying, and the late Mr. Justice Lawson held that the paramount and leading purpose for which the land was let was an agricultural one, and that the holding was "agricultural" within the 71st section of the Act of 1870. He stated that if the primary use was for a mercantile purpose and the land was merely auxiliary to the main purpose for which the holding was let, it might not be regarded as agricultural. In *Wall* v. *Eyre* (2) the holding as demised comprised not alone lands but also the tolls of a fair; and although there was conclusive evidence that the tolls had declined in value to such an extent as not to pay the expenses of collection, the Court of Appeal held that they could not be treated as non-existent. The holding included a subject-matter quite distinct from land—something which, in the words of Walker, C., "under no state of circumstances that can ever arise will become either agricultural or pastoral, and over which the Land Acts give no jurisdiction to fix a fair rent." In that case the argument of triviality had been

(1) 11 I. L. T. 58. (2) 32 L. R. Ir. 475.

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pressed, and Fitz Gibbon, L. J., in dealing with it, says—"We cannot apply the maxim *de minimis non curat lex* unless the *minimum* is so small that we can treat it as non-existent." In both of these cases the non-agricultural element was a constituent part of the holding under the original demise, and did not take the form of a mere easement or *profit-a-prendre* appurtenant to the holding. The present case differs in both particulars. Notwithstanding some evidence of ancient user, I think we may take it that the right to erect these weirs arose under the Fishery Act of 1842, and did not exist as a right appurtenant to the land at the date of the execution of the sub-lease of 1818. That right is a mere easement—a privilege which the occupier of the land in question has, in respect of those lands, a right to enjoy in the foreshore the property of the Crown. A "holding" under the Land Acts consists of land with its appurtenances (*In re Hutchinson* (1)); and the holding in the present case is represented not alone by the 20 acres of admittedly agricultural land adjoining a tidal river, but by the easement of maintaining the weirs in the foreshore of the latter. Whether the easement in question passed under the original sub-lease of 1818 or subsequently came into being as an appurtenant to the lands does not, in my opinion, affect the question we have to consider. The appurtenance, in the shape of a right to erect and keep erected a weir on the foreshore adjoining those lands, existed at the date of the passing of the Land Law (Ireland) Act, 1881. It was created by the Fishery Act of 1842, and being legally erected during the open season of 1862, received a subsequent statutory recognition by the 4th section of the Fishery Act of 1863. The weirs have been fished continuously from that date to the present time by the sub-lessees or their assignees, and are a most valuable property as found by the verdict of the jury. If the land, with this appurtenance, were held to be an agricultural holding, the fair rent would have to be fixed not alone on the lands but on the easement of maintaining these weirs. The rent would issue out of both as a whole. In that state of facts it seems to me to be impossible to say that the holding, in its integrity, is within the meaning of the 5th sect. of the Land Act of 1896 "substantially

(1) 12 L. R. Ir. 79.

agricultural or pastoral in its character." We cannot divorce the land from its appurtenances, and the easement in question being of a non-agricultural character and not being of such trivial value as to bring it withing the doctrine of *de minimis non curat lex* in the sense in which, according to *Wall* v. *Eyre* (1), that maxim might be applicable, I think the holding is one to which the fair rent provisions of the Land Acts do not apply.

As to the case of *Vandeleur* v. *Malcolmson* (2), it is unnecessary for the purposes of the conclusion at which I have arrived to say more than this: The Fishery Act of 1842 authorizes parties entitled to particular estates in lands adjoining the foreshore to fix or erect weirs in the latter, provided such parties are also in the *occupation* of the lands. The weirs in question were legally erected. In my opinion—once the weir is legally erected—the 19th section of the Act must have the effect either of legalizing the maintenance and working of the weir as a permanent easement, no matter for what estate the occupier may hold the lands or of legalizing such maintenance, and working only in cases where the occupier for the time being of the lands holds the latter for one of the estates mentioned in the section. If the former result be the true one, the easement is, I may almost say, indissolubly attached to the land, and takes the position of any other appurtenance; while if the exercise of the right be dependent on the *status* of the occupier, it would no doubt be intermittent in its user and liable to suspension. But having regard to *Nelson* v. *Headfort* (3), the character of the holding is to be determined as of the date of the Land Act of 1881, and at that date the sub-lease was in existence, the tenant under it was exercising the rights conferred by the Fishery Act, and no suspension of these rights had up to that period taken place.

I therefore concur in the conclusion at which the other members of the Court have arrived.

Solicitors for the plaintiff: *Dobbyn & M'Coy.*

Solicitors for the defendant, M. A. O'Neill: *J. Thornton & Sons.*

J. L.

(1) 32 L. R. Ir. 475. (2) 17 I. C. L. R. 569. (3) 18 L. R. Ir. 407.

Q. B. Div. 1900.

PHILLIPS *v.* GUARDIANS SOUTH DUBLIN UNION (1).

Oct. 28, 29. Nov. 1.

Justices—Summary jurisdiction—Poor law—Husband and wife—Husband "deserting or wilfully neglecting to support his wife"—Vagrancy (Ireland) Act, 1847 (10 & 11 *Vict. c.* 84), *s.* 2.

Upon a complaint before Justices, under 10 & 11 Vict. c. 84, s. 2 (the Vagrancy, Ireland, Act, 1847), to commit a husband to prison for "deserting and wilfully neglecting to maintain" his wife:—

Held (*diss.* Lord O'Brien, L.C.J.), that the defendant was entitled to adduce evidence to prove the wife's adultery, and such adultery, if substantiated, would afford a good defence.

The English cases on the words "wilfully refusing or neglecting to maintain" a wife, in sect. 3 of the Vagrancy Act, 1824 (5 Geo. 4, c. 83), discussed and followed.

Case stated, pursuant to 20 & 21 Vict. c. 43, by one of the Divisional Justices for the Metropolitan District of Dublin.

In April, 1900, the Guardians of the South Dublin Union (the complainants) applied by summons under the 10 & 11 Vict. c. 84, s. 2, to commit the defendant to prison for "deserting and wilfully neglecting to support his wife, Eliza Phillips, so as to cause her to become destitute and to be relieved in the workhouse of the said Union."

The Divisional Justice (Mr. E. G. Swifte), on hearing the case, ordered that the defendant should be committed to prison for fourteen days with hard labour, but at the defendant's request, stated this case for the opinion of the Court.

At the hearing before the Divisional Justice, counsel for the defendant pressed that evidence should be admitted of an adjudication in the same Court on the 1st March, 1900, upon a summons brought by defendant's wife against the defendant for maintenance under 58 & 59 Vict. c. 39, s. 4; but this the Justice declined to do.

(1) Before Lord O'Brien, L.C.J., and Boyd and Barton, JJ.

Counsel for the complainants having produced several witnesses, who gave the usual necessary proofs of the marriage, and of the husband's refusal to maintain his wife, and of her having consequently for some time been in receipt of relief from the Union, counsel for the defendant proposed to produce evidence of adultery by the defendant's wife as a defence to the complaint by way of justification for the defendant's refusal to support his wife. The Justice, however, held that the proposed evidence was not admissible as an answer to the complaint of the Guardians; and, there being no other evidence tendered or defence raised, he convicted the defendant. For the grounds of the rejection of the proposed evidence the Divisional Justice referred to the written judgment delivered by him, and now submitted for the opinion of the Court the question whether or not he was right in point of law in refusing to admit such last-mentioned evidence.

Rynd, for the complainants.

P. Keogh, for the defendants.

[Counsel referred to 10 & 11 Vict. c. 84, s. 2,; 1 & 2 Vict. c. 56, s. 53; Mr. Blackburne's opinion, given in Mooney's Irish Poor Law (page 26, *note*); *R.* v. *Flintan* (1); and *Culley* v. *Charman* (2).]

Cur. adv. vult.

Nov. 1.

BARTON, J.:—

This is a case stated by the Dublin Divisional Magistrate, Mr. Swifte. The defendant, Thomas Phillips, was prosecuted before him under section 2 of the Vagrancy (Ireland) Act, 1847 (10 & 11 Vict. c. 84), which runs as follows:—

> "And be it enacted that every person who shall desert or wilfully neglect to maintain his wife or any child whom he may be liable to maintain, so that such wife or child shall become destitute, and be relieved in or out of the workhouse of any Union in Ireland, shall, on conviction thereof before any Justice of the Peace, be committed to the common gaol or House of Correction, there to be kept to hard labour for any time not exceeding three calendar months."

(1) 1 B. & Ad. 227. (2) 7 Q. B. D. 89.

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A *prima facie* case having been established by the prosecution, the defendant offered evidence of his wife's adultery, setting up the defence that he was not liable to maintain his wife on account of her adultery. The magistrate rejected the evidence and convicted the defendant. We are asked to say whether he was right in doing so. In other words, we are asked to decide whether an adulterous wife is a wife whom a husband is liable to maintain within the meaning of section 2 of the Vagrancy (Ireland) Act, 1847.

In my opinion the magistrate was wrong in rejecting this evidence. By the common law of England and of Ireland a husband is "not liable to maintain" an adulterous wife. Accordingly, under the corresponding section of the English Vagrancy Act, 1824 (5 Geo. 4, c. 83, s. 3), a wife's adultery has always been held to be a good defence to proceedings against a husband for "wilfully refusing or neglecting to maintain" his wife. This has been established in a long line of cases from *R.* v. *Flintan* (1) to *Morris* v. *Edmonds* (2).

I may add that the English and Irish sections are very similar, but there are some differences. In the older English Act there occurs the antiquated description of a vagrant as "an idle and disorderly person," which is naturally omitted from the more modern Irish statute. The offence in the English Act is "wilfully refusing or neglecting to maintain," while in the Irish Act it is "deserting or wilfully neglecting to maintain." The only other difference is that the Irish section is the more penal and stringent of the two, carrying with it a penalty of three months' hard labour without the option of a fine, while the maximum penalty under the English Act is one month's hard labour with the option of a fine not exceeding £5. The English Judges in construing the English Act have noticed its penal character. I think that it would be strange indeed if a wife's adultery were a good defence to proceedings under the English Act, and were no defence to the still more penal provisions of the Irish Act. However, I am glad to say that I do not think we are driven to holding that there is any such difference between the criminal law of the two countries.

(1) 1 B. & Ad. 227. (2) [1897] 77 L. T. (N.S.) 56.

The judgment of Mr. Swifte rests on the 53rd section of the Irish Poor Law Act, 1838, which enacts as follows:—

> "*For the purposes of this Act* every husband shall be liable to maintain his wife."

Mr. Swifte points out that Mr. Blackburne, when Attorney-General, gave a well-known opinion on this section as Law Officer, which has been cited in several text-books, and was approved in the case of *M'Evoy* v. *Guardians of Kilkenny Union* (1). This opinion was to the following effect:—"The 53rd section enacts that 'every husband shall be liable to maintain his wife, and shall be so *for the purposes of this Act*.' I therefore think that a husband cannot set up any justification of his desertion of her when he is sued or proceeded against by virtue of any clause *in this statute*. . . . *R.* v. *Flintan* (2) was decided in the absence of liability at common law; but here, for all the purposes of the Act, liability exists, even though there was an end of it at common law." This opinion has been approved and adopted by a judgment of this Court in the case of *M'Evoy* v. *Guardians of Kilkenny Union* (1), and we are bound by that decision; but in my opinion it has no application to the present case. It applies to several kinds of proceedings (which all happen to be of a civil, not of a criminal, nature) for the enforcement of maintenance which are prescribed by the Poor Relief Act, 1838, and by the Poor Relief Extension Act, 1847, but does not, and, I think, cannot, further or otherwise affect the liability of a husband under other statutes, and least of all where those statutes are of a penal and criminal kind.

I would point out that the 53rd section of the Poor Law (Ireland) Act, 1838, is strictly limited in its operation by the words "for the purposes of this Act" (*i.e.*, the Poor Law, Ireland, Act, 1838), and that Mr. Blackburne's opinion is limited in the same way by its terms to "this statute" and "the purposes of the Act." I would further point out that Mr. Blackburne ceased to be Attorney-General in 1842. Accordingly, the 53rd section of the Poor Law (Ireland) Act, 1838, has, in my opinion, no application to the Vagrancy (Ireland) Act, 1847, and Mr. Blackburne's

(1) 30 I. L. T. R. 156. (2) 1 B. & Ad. 227.

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opinion, as a Law Officer, does not apply to a statute which was not passed until more than five years after Mr. Blackburne had ceased to be Law Officer, and which may have been passed for the very purpose of bringing these penal provisions outside of the harsh rule, as some would think it, involved in his correct interpretation of the Poor Law Act, 1838.

Mr. Swifte was of opinion that, because the 2nd section of the Vagrancy (Ireland) Act, 1847, is substituted for the repealed section (sect. 59) of the Poor Relief (Ireland) Act, 1838, the two Acts must be read as one Act, and the 53rd section of the Poor Relief (Ireland) Act, 1838, though strictly limited "to the purposes of this Act," must be held to apply also to the Vagrancy (Ireland) Act, 1847. I dissent altogether from this mode of construing this penal statute. If the Legislature had wished the Vagrancy (Ireland) Act, 1847, to be read as one Act with the Poor Relief (Ireland) Act, 1838, it could have said so. In the same year the Legislature did say so in the case of the Poor Relief Extension Act, 1847 (10 Vict. c. 31), which provided in sect. 8 for certain civil remedies for the enforcement of out-door relief, and then proceeded in sect. 30 to provide that it was "to be construed as one Act with former Poor Relief Acts, including the Poor Relief Act, 1838." Accordingly, I think that sect. 53 of the Act of 1838 and Mr. Blackburne's opinion would apply to sect. 8 of the Poor Relief Extension Act, 1847; but in my opinion it does not apply to sect. 2 of the Vagrancy (Ireland) Act, 1847, because the latter Act nowhere says that it was to be construed as one Act with the Poor Relief (Ireland) Act, 1838.

I recognise fully the general rule of construction under which substituted provisions may be construed and explained by reference to the former statute containing the repealed provision for which they are substituted. But in this case we are asked to construe the substituted provision by reference to a section in the former statute which was strictly limited to *the purposes of that statute.* I can find no case where the rule of construction to which I have referred has been pushed so far as this; and I am particularly slow to extend the rule to this extent in the case of a highly penal statute so as to deprive a defendant of a defence which, on the words

of the statute under which he is prosecuted, is clearly open to him.

I think that it is quite likely, and, at all events, it is quite possible, that the Legislature deliberately took this penal provision out of the Poor Law code, and transplanted it into the Vagrancy Act of 1847 in order to prevent the application to it of the exceptional and somewhat severe rule involved in Mr. Blackburne's opinion. It is also quite possible that when the Legislature in 1847 passed a Vagrancy Act for Ireland they intended to place this provision as to the penal enforcement of the maintenance of a wife on the same basis as the corresponding provision of the English Vagrancy Act, 1824; at all events, whether this was the intention of the Legislature or not, I think that this has been the effect of the repeal of the 59th section of the Poor Relief (Ireland) Act, 1838, and the substitution for it of the 2nd section of the Vagrancy (Ireland) Act, 1847. In the latter section the word "wilfully" was introduced from the English Vagrancy Act, where it has been the subject of judicial decisions; and it appears to be necessary to the argument for the prosecution in this case that the word "wilfully" has a different meaning in the Irish Vagrancy Act and English Vagrancy Act respectively. I admit that the word "wilfully" may be construed differently in different contexts, but it would be strange indeed if in two corresponding sections of two English and Irish penal Acts it was intended to use it in different senses. I think it far more probable that it was intended, in 1847, to assimilate the English and Irish law so far as the penal vagrancy sections were concerned.

I quite agree that the Vagrancy (Ireland) Act, 1847, has a close relation to the Irish Poor Law, and that, whenever a husband is liable to maintain his wife at common law, criminal proceedings may be taken under this second section against a husband who deserts or wilfully neglects to maintain his wife so that she becomes destitute and relieved in or out of the workhouse. But I do not think that the absolute liability to maintain a wife, which was created by the 53rd section of the Poor Law (Ireland) Act, 1838, for the purposes of that Act only, can without express words be imported into the Vagrancy (Ireland) Act, 1847. I can find no such express words, and I know of no rule of construction by

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which they can be supplied or dispensed with. It seems to me that if we were to import those words without express legislative authority from the earlier Act into the later Act, and thereby take away the defence which is open at common law on the words of the Act itself, we should be doing that which it is the duty of the Court to avoid doing; we should be supplementing a defect of legislative expression for the purpose of taking away a common law defence to a penal statute—a proceeding which looks very like the creation of a "constructive" crime or offence.

I find that the Short Titles Act, 1896, in the schedule classifies all these Acts in the same way as I would classify them. The English Act (5 Geo. 4, c. 83) is to be cited as the Vagrancy Act, 1824; 10 & 11 Vict. c. 84 (the Act under which these proceedings were taken) is to be cited as the Vagrancy (Ireland) Act, 1847, and twenty statutes are to be cited as the Poor Relief (Ireland) Acts, 1838 to 1896. These Poor Relief Acts include the Poor Relief Extension Act, 1847, but they do not include the Vagrancy Act, 1847, which is treated as an independent statute, and not one of the Irish Poor Law Acts. The schedules to the Short Titles Act are not conclusive; but I refer to these classifications as harmonising with and illustrating my view, which seems the natural one—that the Vagrancy (Ireland) Act is not a Poor Law Act, though it deals *inter alia* with some offences under the Poor Law, but is an independent penal statute corresponding to the English Vagrancy Act of 1824.

I need not say that I put forward with diffidence any view which differs from that of the Lord Chief Justice. If it had not been for the difference of opinion in the Court my judgment would have been a very brief one, and I feel that an apology is due for so long a judgment on so small a point.

In my opinion the whole case turns on the meaning of the words, "wife whom he may be liable to maintain," in the section under which the prosecution was brought. If those words have their ordinary meaning, which they bear under the general law of England and Ireland, the magistrate was wrong, because no husband, rich or poor, is liable by the general law of England or Ireland to maintain an adulterous wife. If, on the other hand, those words have the special meaning which sect. 53 of the Irish

Poor Relief Act, 1838, enacted for the purposes of that Act, the magistrate was right, because it is settled that the liability under that Act is absolute and creates an exception to the general law.

The grounds of my opinion are capable of being briefly summarised. I admit that sect. 53 of the Irish Poor Relief Act, 1838, creates, for the purposes of *that* Act, and of course equally of any Act expressly incorporated with *that* Act, an absolute liability on husbands to maintain their wives, and that consequently in the civil proceedings for the enforcement of maintenance which may be taken against husbands under that Act or any Act incorporated with it, this defence would not be available. But I think that the Vagrancy (Ireland) Act, 1847, cannot be regarded as incorporated with the Poor Law Act, 1838, so as to extend to the latter Act a provision which was strictly limited to the purposes of the earlier Act, and I think that in the highly penal provisions of the Irish Vagrancy Act, 1847, the Legislature provided, and probably intended to provide, that the husband's liability to maintain his wife was to be the same as was contemplated by the English Vagrancy Act, 1824.

Accordingly I am of opinion that the magistrate was wrong in rejecting this evidence, and I am glad to be able to come to the conclusion that the Irish Vagrancy Act does not bear the harsh construction which the prosecutor contends for—a construction which, on the corresponding section of the English Vagrancy Act, has been rejected by every English Judge who considered the section, from Bayley, J., in 1830, to Henn Collins, L.J., in 1877.

BOYD, J. :—

I also am of opinion that the magistrate was wrong, and have arrived at this conclusion with considerable difficulty and doubt. But, as this is a criminal proceeding, I think the appellant is entitled to the benefit of any doubt that I may entertain.

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The complaint is issued under the 2nd section of the Vagrancy Act, 1847 (10 & 11 Vict. c. 84), for the purpose of committing the defendant to prison "for deserting or wilfully neglecting to maintain his wife, so that such wife has become destitute, and has been relieved in or out of the workhouse."

This is a criminal provision like that contained in section 59 of the Poor Law Act of 1838, which for the first time imposed the penalty of imprisonment upon a husband who neglected to maintain his wife—an obligation which (it is alleged) is under this enactment subject to no qualification whatever.

It is necessary to consider what are the provisions of the Acts which impose the legal obligation upon a husband in reference to the maintenance of his wife. By 1 & 2 Vict. c. 56, s. 53, it is enacted "That *for the purposes of this Act* every husband shall be liable to maintain his wife." The purposes of the Act were the relief of the destitute poor, and the defining of the parties who should be liable therefor in certain events, as in section 54. By section 59 it is provided "That if any person shall desert and leave his wife . . . *so that* such wife . . . shall become destitute *and* be relieved in the workhouse," he should be liable on conviction to be committed to gaol for a period not exceeding three months. So the law continued from the date of the said Act (1838) to the year 1847, when the statute 10 & 11 Vict. c. 84 was passed, and by section 1 it repealed so much of section 59 of 1 & 2 Vict. c. 56, as provides for the punishment of persons deserting their wives whom such persons may be liable to maintain, so that such wives should be destitute and be relieved in the workhouse of a Union. By section 2 it enacts "that every person who shall desert or WILFULLY *neglect to maintain his wife* . . . *so that* such wife shall become destitute *and be* relieved in or out of the workhouse, . . . shall on conviction thereof" be liable to imprisonment for a period not exceeding three months. By desertion of itself in neither statute did the husband incur any liability, which only was created a criminal offence in case the wife's maintenance was thrown upon the Union. Why then was the provision introduced into the later Act, "or *wilfully* neglect to maintain" his wife? I take it that it was introduced so as to enable the husband to prove that his neglect to do so was not wilful or without just cause.

A man is thus made a criminal where, at common law, before these Acts were passed, he would not have been a criminal; for at common law it would have afforded this man a complete defence if the wife's adultery or unfaithfulness was the cause of his desertion or neglect to maintain. This defence may have been taken away by the sections of the former Act, but I think it has been restored by the later Act. In a criminal proceeding such as the present, I think that, unless it is clearly made an offence without exception or qualification, the accused is entitled to any defence outside the statute as well as to any that may be given by the statute. Hard cases make bad law; but this is a particularly hard case, if it be true that the defendant is responsible if what he alleges be true. I am not saying whether the charge be true or not, for Mr. Swifte refused to take any evidence in regard to the charge of adultery, and so the man was debarred from putting forward that defence which he would have had at common law. The question, therefore, before us is, whether the defendant was entitled to have had the case heard upon the facts, and to be relieved of liability in case his neglect was not wilful.

Mr. Justice Barton has referred to the case decided by Lord Justice Collins (1) which establishes a clear distinction between a civil proceeding for maintenance and one taken under the criminal law. In the section with which we are dealing the word "wilfully" is employed, but it is introduced not before but after the word "desert"—"desert or *wilfully* neglect to maintain his wife"; and I fail to see what ground the guardians would have to interfere if a man *deserted* his wife upon the ground of misconduct on her part. In that case no charge is imposed upon the guardians, and they would have no right to interfere or make them live together. Unquestionably, in the Matrimonial Courts, it is a complete defence to say, I will not live with my wife because of her infidelity, but here the summons was issued for deserting and wilfully neglecting to maintain; and I take it that the meaning of "wilfully" in this section is that which was given to it by Lord Justice Collins in the case to which I have already referred.

There are other cases also which bear by analogy upon the

(1) [1897] 77 L. T. (N. S.) 56.

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meaning of the word "wilfully" in such a case as this; and I would refer in the first place, to the case of *Reg.* v. *Tolson* (1). That was a case where a man was indicted for bigamy, and the question was whether the husband really and *bona fide* believed that his first wife was dead at the time he married the second. There, in the course of his judgment, Stephen, J., states the law as follows:—

> "A *bona fide* claim of right excuses larceny and many of the offences against the Malicious Mischief Act. Apart, indeed, from the present case, I think it may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence."

He then discusses several provisions of the statute and the exceptions to the rule of *mens rea*, and comes to the conclusion that, although this exception was not mentioned expressly in the enactment under his consideration, still it must be imported into it, and upon that ground he gave judgment in favour of the alleged criminal.

Again, in the case of *Smith* v. *Barnham* (2), in an action against a man for wilfully polluting a stream, the defence was that the act was not *wilfully* done, because the defendant thought he had a right so to do; and the question for decision, therefore, was, what was the meaning of the word *wilfully* in the Act there in question? In the course of his judgment Baron Bramwell there says:—

> "Further, I think that the refuse was not wilfully thrown in, within the meaning of the clause, for it was discharged in the course of carrying on a lawful trade, and, as it appears, in the exercise of a supposed right. 'Wilfully' appears to me in this section to mean *wantonly* or *causelessly*."

In the present case, therefore, when I find that the statute makes a man liable in case of desertion or wilful neglect, I think there must be some reason why that word *wilfully* was introduced. There must be some exception, and what can that exception be

(1) 23 Q. B. D. 168. (2) 1 Ex. D. 419.

but the defence which the common law gave to the husband—a denial of liability upon proof that the wife was of bad character.

The magistrates should have received the evidence as to the character of the woman, and the defendant was entitled upon proof of infidelity to be exonerated from his liability to maintain his wife.

LORD O'BRIEN, L. C. J.:—

The question presented for our determination in this case is this. Is a man who is proceeded against by the guardians of a union under the 2nd section of the 10 & 11 Vict. c. 54, absolved from liability under that section on proof of his wife's adultery? The section provides that every person who shall desert or wilfully neglect to maintain his wife or any child whom he shall be liable to maintain, so that such wife or child shall be destitute and be relieved in or out of the workhouse of any union in Ireland shall on conviction thereof before any Justice of the Peace be committed to prison for a period not exceeding three months.

This is the section under which the summons was issued. The magistrate, Mr. Swifte, finds that the defendant "wilfully neglected to maintain his wife so that she became destitute, etc.," and he rejected the evidence that was offered in proof of the wife's misconduct, holding that her adultery, if she had committed adultery, afforded no defence. Was he right in so doing? I think the magistrate was right. I have read his judgment, which has been incorporated with the case stated. It is a careful judgment, and, in my opinion, correct in point of law.

Mr. Keogh rested his argument upon certain English decisions, and indeed contended that the case *Culley* v. *Charman* (1) concluded the matter, so that there was nothing more to be said.

The fallacy in his argument was the assumption that the law

(1) 7 Q. B. D. 89.

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in England and Ireland must be the same. In the case of *Culley* v. *Charman* (1) it appeared that a man was summoned to show cause why he should not maintain his wife, and, there being no absolute liability at common law or under any English statute, and a similar defence having been set up and proved, it was held that he was not liable, inasmuch as the woman was guilty of adultery.

That case, in my judgment, was perfectly well decided. The obligation to support his wife was conditional, not absolute; it was conditioned upon the wife's good conduct.

But what is the law in this country *so far as the Poor Law is concerned?* It is to be found in section 53 of the Poor Relief Act, 1838 (1 & 2 Vict. c. 56). By that section it is enacted that—

> "For the purposes of this Act every husband shall be liable to maintain his wife."

These are the words, and they are unconditional and unqualified; and in the following sections (ss. 54, 55) it is provided that all relief given under the Act to a wife shall be considered as given to the person declared by the Act to be liable to maintain such wife, and that the cost price of any relief given by way of loan shall be a loan from the guardians to and recoverable from the person to whom the same shall be given or considered as given under the Act.

In the 59th section, since repealed and replaced by the second section of the 10 & 11 Vict. c. 84, it was provided that—

> "If any person *shall desert and leave* his wife, so that such wife shall become destitute and be relieved in the workhouse of any union, every such person shall, on conviction thereof, be committed to the common gaol, there to be kept to hard labour for any term not exceeding three calendar months."

Thus, in that same Act in which the absolute and unqualified obligation had been imposed, there was also a section making the nonfulfilment of that obligation a criminal offence punishable by imprisonment.

(1) 7 Q. B. D. 89.

Some time after the Act was passed a question as to the effect of the sections I have quoted arose; a case was laid before Mr. Blackburne, when Attorney-General for Ireland; and his attention was directed to the English decision in *R.* v. *Flintan* (1), the case which is the root and basis of all the English decisions. The opinion which Mr. Blackburne then gave has always been considered to be the law of this country; we are not bound by it as an authority; but the reasons expressed by that very eminent lawyer entirely commend themselves to my mind. Let me read what he says, and then consider whether the 2nd section of the 10 & 11 Vict. c. 84, makes any difference, remembering that, under the Act of 1838, section 59, the offence was one for which a person might be committed to the common goal.

Mr. Blackburne's opinion, to the following effect, is given in Mooney's Compendium of the Irish Poor Law, at page 26:—

> "The 53rd section enacts that 'every husband shall be liable to maintain his wife and shall be so for the purposes of this Act.' I therefore think that a husband cannot set up any justification of his desertion of her when he is *sued or proceeded against* by virtue of any clause in this statute. I think evidence that a man and woman lived together, and were reputed to be man and wife, is admissible to prove them legally married. *R.* v. *Flintan* (1 B. & Ad. 227) was decided in the absence of liability at common law; but here, for all the purposes of the Act, liability exists, *even though there was an end of it at common law.*"

This was the opinion of that great lawyer, given when Attorney-General for Ireland, and it has apparently been acted upon in this country ever since. We are not, of course, bound by the "opinion" even of so eminent a lawyer who was equally distinguished as Attorney-General, Chief Justice, and Lord Chancellor. The matter, however, came before this Court. In *M'Evoy* v. *The Guardians of the Kilkenny Union* (2) (to which we have been referred by the learned reporter) where a wife deserted her husband, walked away from him, deserted him, not he her, it was decided, in this Court, by Johnson, Holmes, and Madden, JJ., that this opinion correctly stated what the law of the country was, and that *R.* v. *Flintan* (1) was not applicable to Ireland. In *M'Evoy's Case* (2)

(1) 1 B. & Ad. 227. (2) 30 Ir. L. T. R. 156.

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the husband's pension had been attached by the guardians to recoup themselves for the expense of her maintenance; the husband had proceeded against them for the recovery of the money; a decree had been given in the County Court; but this Court, on case stated by the Judge of Assize, reversed the decree, holding that the husband was absolutely liable to the guardians for the support of his wife, and not under any conditional liability to be defeated by a plea of her desertion or adultery. The report states that the Court were of opinion that "the authorities quoted for the plaintiff did not apply to the Irish Poor Law Code, which, for the purposes of poor law relief in Ireland altered the common law in that respect."

The Court referred with approval to the opinion given by Mr. Blackburne. This opinion clearly applied to criminal as well as civil liability. As to this there can be no doubt. Mr. Blackburne was quite distinct about it, in fact, he says so in so many words.

He says, "he (the husband) shall be liable for all the purposes of the Act." He does not limit the operation of the Act to that section of the Act which dealt exclusively with civil liability. He says he thinks that the husband cannot set up any justification for deserting his wife when he is sued or proceeded against by virtue of any clause in the statute. He uses the words "proceeded against" in contradistinction to the word "sued." The word "sued" would be an appropriate term with reference to the 34th and 35th sections of the Act, which are conversant with civil liability; the words "proceeded against" being appropriate in the case of criminal liability which was imposed by the 59th section of the Act. He distinguishes *The King* v. *Flintan* (1), and says the husband is liable for *all* the purposes of the Act.

Now section 59 of the Act of 1838 has been repealed and superseded by the 2nd section of the 10 & 11 Vict. c. 84. The two Acts have been spoken of as *in pari materia*; they are not only *in pari materia*, but one section is plainly in substitution for the other. It is only requisite to look at the Act of Parliament to see that one section has been substituted for another.

What is the title of the Act (10 & 11 Vict. c. 84)? It is

(1) 1 B. & Ad. 227.

intituled, "An Act to make provision for" *two classes*, "for the punishment of vagrants and persons offending against the law in force for the relief of the destitute poor in Ireland." In the preamble also it is stated that it is expedient to make "*further provision*" for the punishment of beggars and vagrants and persons offending against the laws in force for the relief of the destitute poor. The two classes are, beggars and vagrants on the one hand, and offenders against the poor law on the other.

Then the statute proceeds to repeal the 59th section of the Poor Relief Act, 1 & 2 Vict., and to enact the 2nd section. The "*further provision*" is in the insertion of the words "wilfully neglect to maintain." It does not purport to amend the 1 & 2 Vict. It leaves the liability under that Act as it was, and makes "further" provision; that is to say, in the new section it incorporates the former state of the law and adds to it. It is simply demonstration that the section was enacted to give to the 53rd section of the Poor Relief Act further effect than had been already given to it. That section enacted that the husband shall maintain his wife; and it would be defeated equally by his deserting her or by wilfully neglecting to maintain her; and if this was the object of the statute, why should the commission of adultery by the wife be no ground of exoneration of the husband in the case of desertion, and be a ground of exoneration when the husband wilfully neglected to maintain the wife. The substituted section speaks of two things, "deserting" and "wilfully neglecting to maintain." The word "wilfully" does not occur before the word "desert," nor, what is more important, does the word "unlawfully" occur before the word "desert": see *The Queen* v. *Prince* (1). Thus, if a man deserted his wife, this would be of itself enough to make him liable; and the fact of her having, or the *bona fide* belief of the husband that she had, committed adultery, would be no ground of defence. This, I think, is clear, and upon this Mr. Blackburne's opinion is precisely in point. The language is absolutely unqualified, and the same, so far as relates to desertion, as the 59th section of the 1 & 2 Vict. The word "wilfully" is introduced before "neglect." Why? The reason

(1) L. R. 2 C. C. 154.

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is perfectly obvious; a man was not to be held responsible, if he had not the ability or the means, or if, through accident or illness, he was unable to maintain her. But if a husband deliberately, and without such excuse as I have referred to, neglected to maintain his wife, so that she became destitute and was relieved in or out of the workhouse of any union, he is liable, by virtue of this section, to be proceeded against criminally.

The word "wilfully" is not found before the word "desert," because "deserting," *ex vi termini*, implies a deliberate act. It is inserted before "neglect," because "neglecting" may not involve deliberation or intention to do the particular thing. When a man deserts his wife, he does so deliberately, having the power not to do so; for this, when destitution and relief in the poorhouse ensue, he is made criminally responsible. So is he likewise made criminally responsible if he deliberately, intentionally, neglects to maintain the wife, when he has the ability or the means to do so. The offences are to a certain extent cognate, the common element being a deliberate act of commission or omission, the act of commission being involved in the word "desert," and the deliberate act of omission being rendered necessary by the word "wilfully."

Now what was *R.* v. *Flintan* (1), which was the original decision, upon which all subsequent decisions under the English Vagrancy Act of 1824 were based? *R.* v. *Flintan* (1) was an obviously right decision, having regard to the language of the Act upon which it was decided. The Vagrancy Act of 1824, in its 3rd section, enacts that "any person being able in whole or in part to maintain himself or herself or his or her family by work or other means, and wilfully refusing or neglecting so to do, by which refusal or neglect he or she or any of his or her family, whom he or she may be legally bound to maintain, shall become chargeable to any parish, township, or place, shall be deemed an 'idle and disorderly person' within the true intent and meaning of this Act."

In *R.* v. *Flintan* (1), Bayley, J., said:—"By the 5 Geo. 4, c. 83," (the Vagrant Act of 1824), "a man is criminally

(1) 1 B. & Ad. 227.

liable for refusing to maintain any of his family whom he is legally bound to maintain. The obligation must be made out, and it is not established in the case of a wife who has left her husband and lives in adultery." The correctness of this decision is quite obvious. A man is not "legally bound to maintain" a wife who commits adultery. The condition of his liability is not maintaining a person he is legally bound to maintain: the liability is not absolute; it is conditional; and it was precisely this distinction that Mr. Blackburne took in his clear opinion. The case of *Cully* v. *Charman* (1) was decided upon the construction of the English Poor Law Amendment Act (31 & 32 Vict. c. 122, s. 33). That Act gave the husband an opportunity of showing cause why he should not pay. This, as Huddleston, J., pointed out, showed there were cases in which the husband was not liable, and he was of opinion that one of these cases was the adultery of the wife. Hawkins, J., said: "I do not think there is any need to cite authorities to show that a man is not bound at common law to maintain a wife who has been guilty of adultery, and who is living apart from him; the question is, whether it was the object of the statute to impose a liability upon him in such a case that did not occur before. I do not hesitate to come to the conclusion that it did not.

In *Cully* v. *Charman* (1), the Judges held that *R.* v. *Flintan* (2) was a precise authority in favour of the husband. Huddleston, J., said the matter was too clear for argument; and I must say that I quite agree with him. The only difficulty in the case is caused, not by *R.* v. *Flintan* (2), or by *Cully* v. *Charman* (1) that Mr. Keogh relied upon, but by the case of *Morris* v. *Edmonds* (3), which Mr. Swifte himself discovered, and which he deals with in his judgment.

Morris v. *Edmonds* (3) was a case under the Vagrant Act of 1824, which I have already quoted. The wife had not committed adultery; but the husband believed she had done so. Lord Justice (then Mr. Justice) Collins, a Judge of very high authority, appears at first to have been somewhat exercised by the fact that adultery was not in fact committed; he referred to the word "wilfully" in

(1) 7 Q. B. D. 89. (2) 1 B. & Ad. 227.
(3) 77 L. T. (N. S.) 56.

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the Vagrant Act of 1824; and concluded by deciding that a person who *bona fide* believes that his wife has committed adultery, should not be considered "an idle and disorderly person" within the meaning of the Act. It would, indeed, be very far fetched and contrary to every suggestion of propriety and common sense to hold that a man who honestly and on reasonable grounds believed his wife guilty of adultery, and on that ground refused to maintain her, should be deemed an "idle and disorderly person." He may be entirely mistaken; but it would be wholly incongruous to describe him as "idle and disorderly." Therefore in the particular case, and under the words of the particular section, in order to escape from finding what would be a "lame and impotent" and most incongruous conclusion that an honest man, who acted on a reasonable belief, was an "idle and disorderly person," the Judges held that the import of the word "wilfully" in the particular statute was negatived when the case showed that there was no such moral delinquency as would be implied in deeming a man "idle or disorderly." His honest and reasonable belief placed him without the purview of the particular statute which dealt in one section with "idle and disorderly persons," and in another with "incorrigible rogues." The judgment is a short one, not to be found in the authorized Reports, but according to the report in the "Law Times," Mr. Justice Collins expressed himself thus:—

> "I am of opinion that we ought not to interfere with the discretion of the magistrates. They heard and saw the parties, and came to a conclusion that this was *bona fide*. I was impressed at one time with the distinction of the fact of adultery and the *bona fide* belief of adultery; but this is a proceeding not to enforce maintenance, but a penal proceeding for an offence, and so we must look and see if the respondent has 'wilfully' refused to maintain. The authorities quoted establish that under the circumstances of this case the man cannot be described as an idle and disorderly person, I think the decision of the magistrates perfectly right, and this appeal must be dismissed."

The language of the judgment, I think, justifies my comment on it. But we are not dealing with the English Vagrant Act of 1824. We are dealing with the 2nd section of the 10 & 11 Vict. c. 84, which uses very different language, and is directed, not

merely against vagrants, but also against offenders against the Poor Law then in force; and I ask this question, is the fact of adultery to be no ground of defence in the case of desertion; and is it to be a good ground of defence for neglecting to maintain a wife, though the husband has abundant means to maintain her?

It would come to this, that under the self-same section in the case of *desertion* by the husband, he is liable, though the wife may have committed adultery, and may be actually living in a state of adulterous intercourse; while, in the case of *neglecting* to maintain, his *bona fide* belief that she had committed adultery, when in fact and truth she had not, would be a good ground of defence.

The Queen v. *Tolson* (1) has been referred to, but with all deference, it appears to me to be the veriest *petitio principii*, the veriest begging of the question, to say that that case rules the question before us. It was decided in that well-known case, that if a woman believed on reasonable grounds, that her husband was dead when she went through the ceremony of marriage with another man, she was not guilty of bigamy, a decision which of course I must unreservedly adopt, though there was amongst the English Judges a large and authoritative dissent from it. Indeed, the more one reads the judgment of Mr. Justice Manisty, which was adopted by the dissentient minority, the more one thinks a good deal can be found in derogation of it; but there the accused honestly and upon reasonable grounds believed in the existence of a fact, viz. the death of her husband, which, if true, would of course, *ex concessis*, preclude all guilt.

The point here, however, is whether the existence as a matter of fact of adultery would be a ground of defence. In my opinion it would not. It is, I think, absolutely plain that it would not excuse if the summons was confined to one branch of the section, namely, to "deserting" the wife. If this were so, Mr. Blackburne's opinion would be precisely in point. As I have said, there is no such word as "unlawfully" before the word "desert," and as to the effect of the word "unlawfully," see the

(1) 23 Q. B. D. 168.

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observations of Lord (then Baron) Bramwell, of Mr. Justice Denman, and of the dissentient judge, Lord Esher, in *Reg.* v. *Prince* (1).

In that case the prisoner was indicted under the 24 & 25 Vict. c. 100, s. 55, for "unlawfully taking an unmarried girl, then being under the age of sixteen years, out of the possession and against the will of her father." The jury found that the prisoner believed upon reasonable grounds that she was eighteen. The Court upheld the conviction, even though the word "unlawfully" was used in the statute. Mr. Justice Manisty commenting upon this case in *Reg.* v. *Tolson* (2), said, "Fifteen out of sixteen Judges in the case of *Reg.* v. *Prince* (1), held that notwithstanding the use of the word 'unlawfully,' the fact of the prisoner believing and having reason to believe that the girl was over sixteen, afforded no ground of defence." "Desertion" then involves criminality, and the existence of adultery is plainly no defence. Then let me ask the question I have asked before. If adultery is no defence in the case of desertion, is not alone the fact of adultery, but a mistaken though honest belief of reasonable grounds of adultery, to be a ground of exoneration in the case of the offence created in the next sentence of the self-same section, the offence of wilfully neglecting to maintain the wife, and that, too, when the policy and object of the 53rd section of the Poor Relief Act (in connexion with which the second section of the 10 & 11 Victoria most unquestionably must be read) was to compel the husband to maintain the wife? The wife would become destitute just as much by the husband neglecting to maintain her as by deserting her. Destitution and relief in a workhouse are equally essential to both offences, and if the result, as regards Poor Law is identical, is the liability to be different? And that, too, in a case where the moral guilt of the husband, if indeed any moral guilt could exist in such a case, would be at least the same; indeed, it would appear to me that there would be less moral guilt in flying from the presence of an adulterous wife, and deserting her, than in deliberately suffering her to starve in one's presence, when there were the means to maintain her.

(1) L. R. 2 C. C. 154. (2) 23 Q. B. D. 168.

The maxim, *non est reus nisi mens sit rea* has been appealed to. The application of this doctrine only tends to confuse, when we lose sight of the scope and object of the statute we are construing. The intention of the statute must be collected from the statute itself. The case of *Cundy* v. *Lecocq* (1) illustrates the rule. There a question arose as to the construction of the Licensing Act, 1872, sect. 3, which makes it an offence for any licensed person to sell any intoxicating liquor to a drunken person. A publican sold intoxicating liquor to a drunken person, who had given no indication of intoxication, not being aware that the person so served was drunk, and it was held that the prohibition was absolute, and that knowledge of the condition of the customer was irrelevant.

Sir James Stephen, giving judgment, said :—

> "I am of opinion that this conviction should be affirmed. Our answer to the question put to us turns upon this, whether the words of the section under which the conviction took place, taken in connexion with the general scheme of the Act, should be read as constituting an offence only where the licensed person knows, or has means of knowing, that the person served with intoxicating liquor is drunk, or whether the offence is complete where no such knowledge is shown. I am of opinion that the words of the section amount to an absolute prohibition of the sale of liquor to a drunken person, and that the existence of a *bona fide* mistake as to the condition of the person served is not an answer to the charge, but is a matter only for mitigation of the penalties that may be imposed. I am led to that conclusion both by the general scope of the Act, which is for the repression of drunkenness, and from a comparison of the various sections under the head 'offences against public order.'"

This is the language of Sir James Stephen, and what are the tests which he applies? Two—the scope of the statute, and construction of other sections.

Apply these tests to this case. The scope of the Act was to make husbands maintain their wives, so that they shall not become destitute, and what did the self-same section—not other sections—provide? That mere desertion, so that the wife became destitute, and be relieved in a workhouse, was an offence

(1) 13 Q. B. D. 207.

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irrespective of commission of adultery. Sir James Stephen says later on in his judgment:—

> "Against this view we have had quoted the maxim that in every criminal offence there must be a guilty mind; but I do not think that maxim has so wide an application as it is sometimes considered to have. In the old time, and as applicable to the common law or to earlier statutes, the maxim may have been of general application; but a difference has arisen owing to the greater precision of modern statutes. It is impossible now, as illustrated by the cases of *Reg.* v. *Prince* and *Reg.* v. *Bishop* (5 Q. B. D. 259), to apply the maxim generally to all statutes, and the substance of all the reported cases is, that it is necessary to look at the object of each Act that is under consideration to see whether and how far knowledge is of the essence of the offence created."

Sir James Stephen in his judgment in *The Queen* v. *Tolson* (1) referred to the decision in *The Queen* v. *Bishop* (2). He said:—

> "The defendant in that case was tried before me for receiving more than two lunatics into a house not duly licensed, upon an indictment on 8 & 9 Vict. c. 100, s. 44. It was proved that the defendant did receive more than two persons, whom the jury found to be lunatics, into her house, believing honestly, and on reasonable grounds that they were not lunatics. I held that this was immaterial, having regard to the scope of the Act and the object for which it was apparently passed, and this Court upheld that ruling."

I need not repeat what I have so often pointed out to be the scope and object of the Act we are construing. The doctrine of *mens rea* is, I think, correctly dealt with in the last edition of Archbold, at page 31. It is there stated that:—

> "The general rule of law is that a person cannot be convicted in a proceeding of a criminal nature, unless it can be shown that he has a guilty mind: *Chisholm* v. *Doulton* (22 Q. B. D. 736; 58 L. J., M. C., 133); *R.* v. *Twose* (14 Cox. 327); but it is impossible now to apply the maxim as to *mens rea* generally to all statutes, and it is necessary to look at the object of each Act to see whether and how far knowledge is of the essence of the offence created: *Cundy* v. *Lecoq* (13 Q. B. D. 207); Stephen, J. (53 L. J., M. C. 125); Hardcastle, Statutes, 2nd ed., 481; Maxwell, Statutes, 3rd ed., 136."

(1) 23 Q. B. D. 168. (2) 5 Q. B. D. 259.

This subject is very interestingly treated in *The Queen* v. *Tolson* (1). Mr. Justice Wills (see page 172 of the report) stated that, "although, as a general rule, there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter, and may be so framed as to make an act criminal, whether there has been an intention to break the law, or otherwise do wrong, or not." Mr. Justice Stephen deals with the maxim, *non est reus nisi mens sit rea*, in a very elaborate and philosophical way. He says:—

> "Though this phrase is in common use, I think it is most unfortunate, and not only likely to mislead, but actually misleading, on the following grounds. It naturally suggests that, apart from all particular definition of crime, such a thing exists as a '*mens rea*,' or 'guilty mind,' which is always expressly or by implication involved in every definition."

This, he says, is expressly not the case, for the mental elements of different crimes differ widely. Later on, he says:—

> "The expression *mens rea* is likely to, and often does, mislead. To an unlegal mind it suggests that, by the law of England, no act is a crime which is done from laudable motives—in other words, that immorality is essential to crime. . . . The principle involved appears to me, when fully considered, to amount to no more than this. The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed. Or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition."

Now this is the language of Mr. Justice Stephen, who was a great criminal lawyer. The question, according to him, which is essential to determine guilt, is what he describes as "the mental element which is involved."

In my judgment this, in this case, entirely resolves itself into the meaning we attach to the word "wilfully" in the particular section. Now the word "wilfully" is not a word of art, it has in the interpretation of statutes no fixed stereotyped meaning, we

(1) 23 Q. B. D. 168.

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must see what it means in the particular section where it is used, and to do this we must not only regard the word itself, but we must regard the whole section in which it occurs, and the scope and object of the statute, to give effect to which the particular section was enacted.

Lord Esher, in his remarkable judgment in *Reg.* v. *Prince* (1), when dealing with the doctrine of *mens rea*, refers to the word "wilfully" and its signification. He is reported to have said, at page 161 of the report:—

> "'Wilfully,' is more generally applied when the prohibited acts are in their natural consequences not necessarily or very probably noxious to the public interest, or to individuals; so that an evil mind is not the natural inference or consequence to be drawn from the doing of the acts. The presence of the word requires somewhat more evidence on the part of the prosecution to make out a *prima facie* case than the evidence that the prisoner did the prohibited acts."

The somewhat more evidence that is required on the part of the prosecution in this case is the evidence of ability or presence of means to maintain the wife and intention not to do so. The case of *Taylor* v. *Newman* (2) illustrates my view. Lord Esher refers to it in his judgment in *R.* v. *Prince* (1), at p. 166. He says:—

> "In *Taylor* v. *Newman* (4 B. & S. 89) the information was under 24 & 25 Vict. c. 96, s. 23. 'Whosoever shall unlawfully and wilfully kill, &c., any pigeon, &c.' The appellant shot pigeons on his farm belonging to a neighbour. The Justices convicted on the ground that the appellant was not justified by law in killing the pigeons, and therefore that the killing was unlawful. In other words they held that the only meaning of 'unlawfully' in the statute was, 'without legal justification.' The Court set aside the conviction. 'I think that the statute was not intended to apply to a case in which there was no guilty mind, and where the act was done by a person under the honest belief that he was exercising a right': Mellor, J."

This case illustrates my meaning. It puts the word "unlawfully" and "wilfully" in contradistinction—"unlawfully" as

(1) L. R. 2 C. C. 154. (2) 4 B. & S. 89.

meaning without lawful excuse, no guilty mind on the one hand, and deliberation—intention—on the other; "wilfully" in the particular section meant deliberately, intentionally killing the pigeons, not killing by chance or accident.

Later on, in the concluding part of his judgment, Lord Esher said :—

> "Upon all the cases, I think it is proved that there can be no conviction for crime in England in the absence of a criminal mind or *mens rea*. Then comes the question, what is the true meaning of the phrase? . . . It is clear that ignorance of law does not excuse. It seems to me to follow that the maxim as to *mens rea* applies whenever the facts which are present to the prisoner's mind, and which he has reasonable grounds to believe, and does believe, to be the facts would, if true, make his acts no criminal offence at all."

Now if this correctly sums up the doctrine of *mens rea* and is the true test, it is quite apparent that to apply it to the present case is the veriest begging of the question, because it assumes that the commission of adultery, or a *bona fide* belief on reasonable grounds of its commission, could be a good ground of defence. This begs the whole question; in fact it confounds the maxim, *ignorantia legis neminem excusat*, with the maxim, *ignorantia facti omnes excusat*: it attaches to the ignorance of law the immunity which attaches to ignorance and mistake of fact.

It may well be that the Legislature was of opinion that the administration of the poor law which was to be enforced by summary procedure, should not be embarrassed by permitting husbands to raise questions as to their wives' fidelity. It may have been thought that, if there were lapses from virtue, still, as between the husband and the general body of the ratepayers, the husband was the person that ought not to allow the wife to starve, and that the only real means of making him pay for her support was to make him criminally responsible; or, what perhaps is most probable, the possibility of an adulterous connexion by the wife never occurred at all to the Legislature, and such a case was left unprovided for. But it would be singular that those who were responsible for the legislation affecting Ireland should have done nothing to modify the law as interpreted by Mr. Blackburne, whose opinion must have been well known, but should in the self-same section have provided that a mistaken, though honest,

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belief that adultery had been committed should be a good defence in the case of neglecting to maintain a wife, and that its actual commission should be no defence whatever in the case of desertion.

As to the argument that we should lean against an interpretation that would create a new offence, this is of course quite true, in fact, very elementary indeed. It is, however, always rightly answered by the question, What is the true construction of the language used? As to the true construction of the particular language used here, I have stated my views, and I fear at too great length. In my opinion the decision of the Divisional Magistrate was correct.

Solicitor for the appellant: *M'Cune.*
Solicitor for the respondents: *J. Fitzgerald.*

J. G. T.

Q. B. Div. 1900. Oct. 31. 1901. April 26.

REG. (PARKER) *v.* CARRIGROHANE DRAINAGE BOARD (1).

Drainage Board—Power to levy rates to pay damages and costs of a successful plaintiff in an action brought against the Board for negligence—Mandamus.

Mandamus may issue against a drainage board to compel such board to levy a rate to enable them to pay the amount of damages and costs awarded against them in an action for injuries sustained by reason of their negligence in the construction of their authorised works.

MANDAMUS. This was an application to make absolute a conditional order for mandamus directed to the Carrigrohane, Maglin, and Ballincollig Drainage Board, directing them to pay to the applicant the sum of £189 1*s.* 8*d.*, and if necessary for that purpose to strike an assessment rate upon the proprietors of lands within their district sufficient to pay the said sum.

The drainage scheme petition was presented to the Board of Works on the 18th March, 1893, and the provisional order con-

(1) Before LORD O'BRIEN, L.C.J., and JOHNSON and BOYD, JJ.

stituting the drainage district was confirmed by Act of Parliament, 58 & 59 Vict., c. ix.

The applicant's land was injured in the negligent carrying out of the works, and she obtained judgment for £10, which, with the costs of trial, new trial motion, and appeal to the Court of Appeal, amounted to £189 1*s.* 8*d.*

The respondents refused to discharge this claim, and, as cause against the mandamus, alleged that they had no moneys out of which to discharge the amount, as the sum advanced to them by the Board of Works for the carrying out of the scheme had not been sufficient even to pay the contractor in full. They further submitted that the Drainage Acts, 1863 to 1892, under which they were constituted and acting, gave them no power to levy a rate for the purpose of paying the amount of such a judgment as that recovered by the applicant.

Matthew J. Bourke, K.C., and *George C. Green*, for the applicant.

A. M. Sullivan, for the respondents.

Cur. adv. vult.

The judgment of the Court was delivered by—

BOYD, J.:—

1901. April 26.

The question for decision in this case is whether the Drainage Board can be compelled to pay to the prosecutrix the sum of £189 1*s.* 8*d.*: £9 thereof being the balance of damages awarded by order and judgment of this Court in an action brought by her against the Board for injury and damage sustained by her by the negligence of the defendants in the construction of their authorised works; £139 1*s.* 11*d.*, being the taxed costs of the said action, and the balance, viz. £40 19*s.* 9*d.*, being the taxed costs of an unsuccessful appeal by the Board against the judgment in said action.

It has been contended on behalf of the Board that they have no money in hands to pay the said claim, and that they have no power to levy a rate to enable them to pay the demand.

On behalf of the prosecutrix it is contended that under sect. 57 of 26 & 27 Vict. c. 88, they have powers to levy rates to defray all costs, charges, and *liabilities* from time to time properly

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incurred by them *in the execution of the provisions of this Act.* It is to be observed that this section primarily deals with the "maintaining and upholding" the works which "shall be executed"; but the section further proceeds to provide for the levying of rates for the purpose of "*effecting*, sustaining, supporting, and upholding all and singular the aforesaid works, and, *for other the purposes of this Act*," to assess, rate, and tax the proprietors of the land for the payment thereof.

We have been referred to the case of *The Queen* (*Donohue*) v. *The Tramore Drainage Board* (1). That was a case in which a contractor obtained a judgment against the Board for the price of extra works executed by him under agreement with the Board, but not specified in the award. He applied to the Court for a mandamus to compel the Board to levy a rate to satisfy the amount of the judgment, but it was held by the Court that his application should be refused on the ground that under sect. 57 rates are leviable by a Drainage Board for the maintenance of works only and not for their construction. One of the objects of the Drainage Act, 1856 (2), was to prevent the expenditure upon the construction of the works of a greater sum than that ascertained by the arbitrator appointed pursuant to the Act, on the faith of whose award the Board of Works fixed the amount which they should advance towards their construction. It was therefore properly held in that case that the Drainage Board had no power to order works extra to those mentioned in the award, and that they could not levy a rate to pay for such extra works. Mr. Justice Gibson, in his judgment in the case, states (3):—"It is argued by Donohue's counsel that under sect. 57 extra works, which could and ought to have been included in the original estimate and award, can be ordered and paid for. In my opinion the section is a maintenance section, and cannot be construed so as to enlarge the original estimate, or to evade the supervision and control of the Board of Works. No doubt things required to work the drainage scheme can be brought under it, and costs, charges, and liabilities in respect of the completed works come within the section; and the Board may, if necessary, raise the amount by borrowing in

(1) 30 L. R. Ir. 329. (2) 26 & 27 Vict. c. 88. (3) 30 L. R. Ir. 339.

the first instance. *Actions may be brought against the Board, and they may have considerable sums to pay for law costs as well as for repairs and other liabilities incurred by them in the execution of the Act.* But it is plain that the mere making of a final award does not enable a Drainage Board, without any supervision or control, to involve the ratepayers in responsibility for new and additional works outside the award. . . . The general words found in the section must, in my opinion, be restrained to the purview of the section, and a subject-matter for their operation can be supplied by such liabilities as I have indicated."

The claim of the prosecutrix in the present case could, under no circumstances, have been included in the estimate or award, which was solely conversant with the cost of the construction of the works, and did not exist at the date of the award. I am of opinion that it does come within the scope of the provisions, as defined in Mr. Justice Gibson's judgment, and that the Drainage Board have the power to levy a rate for the payment of the claim, and should be compelled by mandamus to do so.

By the 65th section the Drainage Board are expressly entitled to defray out of the rates leviable by them all costs, charges, and expenses incurred by them in instituting or defending any legal proceedings instituted or defended by them in their character as a Drainage Board. It seems to me to be absurd to suppose that the Legislature should confer on them this privilege without their being liable to a corresponding obligation to pay their successful opponents. I am of opinion this obligation is imposed upon them by the 57th section, to which I have referred, but also even more decidedly by 10 & 11 Vict. c. 16, sect. 60, which, by sect. 17 of the Drainage Act (26 & 27 Vict. c. 88), is expressly incorporated with that statute. Section 60, after exempting the commissioners from being personally liable for any lawful act done by them in the execution of any of their powers as commissioners, proceeds as follows:—"And the commissioners respectively, their heirs, executors, and administrators, shall be *indemnified, out of the rates* and other moneys coming to the hands of the commissioners by virtue of this and the special Act, for all payments made *or liability incurred in respect of any acts* done by them, and for all *losses, costs and damages* which they may incur *in the execution of the powers granted*

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Boyd, J.

to them." I think it is plain from this section, and also from the provisions of sections 61, 62 and 63, that the Drainage Board in this case are clearly liable to the demand of the prosecutrix, and that we should, by mandamus, compel them to perform their obligation to her.

The case of *Galsworthy* v. *Silby Dam Drainage Commissioners* (1), on somewhat analagous provisions in the Act regulating the Silby Dam Commissioners, is almost an express authority for the conclusion at which I have arrived in this case.

Solicitor for the applicant: *G. F. Murphy.*
Solicitor for respondents: *M. Healy.*

A. E. R. J.

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Dec. 4. 1900. Nov. 8.

REG. (SHANNON) *v.* JUSTICES OF CO. CARLOW (2).

Licensing Acts—Unfitness of applicant—Absence of objection—Justices acting on their own knowledge.

An applicant for the renewal of a publican's licence appeared at the annual licensing petty sessions in a drunken and riotous state, and had that same day, and before the same bench, pleaded guilty to several charges of drunkenness and disorderly conduct:—

Held, that the justices were at liberty to act (though no objection was raised) on their own knowledge of his character so derived, and to refuse the application (3).

MANDAMUS. Application to make absolute a conditional order for the issue of a writ of *certiorari* to remove and quash an order of the Justices of Carlow, made at Hacketstown Petty Sessions on 28th September, 1899, refusing James Shannon's application for the certificate required (3 & 4 Wm. 4, c. 68) to enable him to obtain a renewal of the publican's license theretofore held by him in Hacketstown, on the ground that the order of the Justices was bad and insufficient on its face, and was made without and in

(1) [1892] 1 Q. B. 348.
(2) Before LORD O'BRIEN, L.C.J., and MADDEN and BARTON, JJ.
(3) See now 63 & 64 Vict. c. 30.

excess of jurisdiction, and without any due or legal objection having been made to the grant of the certificate applied for, and for the issue of a writ of mandamus directed to said Justices to enter continuances upon, and to hear and determine the matter of, his application.

The conditional order was granted on the affidavit of the applicant, Shannon, who stated that he had attended with his solicitor at the Petty Sessions Court, and had produced the necessary certificate signed by six householders; that an objection previously lodged by the police had been withdrawn; that no opposition was made to his application, and no evidence tendered, but that the Court, "without any adjournment being asked for," refused the application, their order being—"Publican's certificate refused on the grounds that they (the magistrates) have judicial knowledge that James Shannon has not been of good character within the last twelve months." No notice of objection was before them.

The applicant further stated that he had served notice of appeal, but "unfortunately did not enter into the necessary recognisance," and the Chairman of Quarter Sessions accordingly refused to entertain the appeal. He explained that the "misunderstanding" as to the recognisance "occurred owing to his having been bound over to keep the peace at the same Petty Sessions."

As cause, an affidavit was filed by Mr. R. R. Kennedy, R.M., who stated that the police had served notice of objection to the application but had not proceeded therewith. The resident magistrate then stated:—

"I was aware that a number of charges (15) were on record against the applicant, and I had judicial knowledge of these several charges of drunkenness, disorderly conduct, and assault on the police of a serious character, as having occurred within the present year. These charges had been adjourned from time to time with the purpose of giving the applicant a chance of reformation; but, immediately preceding the application for renewal, Mr. E. T. Mulhall, the solicitor for the applicant, had pleaded guilty on behalf of the applicant to all the above-mentioned charges, and the magistrates made only one order thereon, namely, in respect of a charge of assault on the police, upon which

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charge an order was made binding the defendant to enter into a recognisance to keep the peace, himself in £50 and two sureties of £25 each.

"The bench made this order only on the assurance of the defendant's solicitor that he had become a reformed character; but subsequently, during the sitting of the Court, the defendant was there present in a state of violent inebriation, and conducted himself in such a manner that four policemen were obliged to hold him down and ultimately to remove him from the precincts of the Court, it being impossible to place him in the lock-up attached to the barracks in consequence of an infectious disease having broken out there.

"In all said several charges mentioned in paragraph 3, to which said defendant pleaded guilty, only the one order to enter into recognisance was entered.

"I was also aware that six convictions were entered against the said James Shannon for drunkenness and disorderly conduct during the month of April, 1899.

"Almost immediately after the said order being made, the applicant for a renewal of said licence came before the Court; and, having judicial and personal knowledge of the above facts, and, believing in consequence of same that said James Shannon was not a person of good character, or one fit to carry on the business of licensed publican, the bench refused to sign the certificate of renewal sought for."

An affidavit was also filed by the Clerk of Petty Sessions exhibiting the order made, on the 28th of September, 1899, upon the conviction of James Shannon for an assault upon an officer of the police, binding him to the peace for twelve months. The Clerk also deposed that there were at the time fifteen adjourned charges pending against Shannon, namely, nine charges of drunkenness and disorderly conduct, two of being drunk on his licensed premises, and three of drunkenness, as well as three fresh charges of drunkenness, etc., entered for hearing at the next petty sessions.

Ronan, Q.C., and *W. Johnstone*, for the applicant.

R. R. Cherry, Q.C., and *W. Murphy*, for the Justices.

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[Counsel referred to *Reg.* (*M'Kenney*) v. *Antrim JJ.* (1); *Dempsey's Case* (2); *Marshall* v. *Justices of Co. Tyrone* (3); *Reg.* (*Giant's Causeway, &c., Tramway Co.*) v. *Justices of Antrim* (4); *Reg.* (*Morgan*) v. *Justices of Tyrone* (5).]

The Court reserved judgment pending the decision of the Court of Appeal in *M'Kenney's Case* (1).

1900.

Nov. 8.

LORD O'BRIEN, L.C.J.:—

This is an application to make absolute a conditional order for *certiorari* to compel certain Justices in Carlow to grant a certificate of good character to a man named Shannon, so that he may procure a renewal of his licence as a publican. He applied to the magistrates in September of last year, 1899, for a certificate of good character; and the magistrates, being of opinion that he was a man not of good character, refused the application.

The affidavit upon which Shannon applied for a conditional order for a *certiorari*, instead of being a full and candid statement of the facts upon which the magistrates acted, wholly suppressed them. Those facts are set out in the affidavit of the resident magistrate, Mr. Kennedy. He states that Shannon, on the occasion of his application for a certificate of good character, came into Court in a state of violent intoxication; that that very morning he had pleaded guilty to some fifteen charges of assault, and though leniently treated with reference to these cases of assault by the magistrates, he, nevertheless, before the self-same Court, and on the self-same day, when he applied for the certificate of good character, was (to use the language of the resident magistrate) in such a state of violent inebriation, and conducted himself in such a manner, that four policemen were obliged to hold him down and ultimately to remove him from the precincts of the Court, it being impossible to place him in the lock-up attached to the barracks in

(1) Since reported—[1901] 2 Ir. R. 133, 162; but then pending in the Court of Appeal.

(2) Unreported.

(3) [1896] 2 Ir. R. 15.

(4) [1895] 2 Ir. R. 603.

(5) [1896] 2 Ir. R. 318.

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consequence of an infectious disease having broken out there. The magistrate further states in his affidavit that six convictions had been already entered against the applicant for drunkenness and disorderly conduct during the month of April, 1899.

Now, in the applicant's affidavit there is not a word as to his condition or conduct in Court. There is not a word as to the basis and ground of the magistrates' decision. This is all deliberately kept back, and this suppression is, in my opinion, an abundant justification for refusing the order now sought. It is the well settled practice of this Court that, when a conditional order is applied for, all the material facts should be fully and fairly stated. In the present instance the very facts which formed the basis of the actual decision are suppressed.

This, in my opinion, is enough to dispose of the case. But there are several other grounds on which the application should be refused.

In the first place, the granting of the writ would be abortive. The writ is asked for to compel the magistrates to grant a certificate with a view to getting a new licence for a year now passed.

The house in respect of which the licence is sought was not open during the year 1899–1900, and the magistrates therefore could not certify that it was well *conducted as a public-house* during the year. As this certificate, which is essential to a renewal, cannot now be given, the plaintiff would not be entitled to a renewal, but must apply for a new licence. Mr. Ronan says that if this is so, the principle of *actus curiæ nemini injuriam facit* will be infringed; that he was entitled to the order when asked for, and that he should not be prejudiced because the Court of Appeal delayed in giving their judgment in *M'Kenney's Case* (1). This seems to be a very untenable position. There was no "*actus*" whatever on the part of the Court of Appeal, within the meaning of the maxim. The Court simply took time to consider their judgment in another case, in *M'Kenney's Case* (1)—a case of great difficulty, in which there was a difference of opinion both in this Court and the Court of Appeal. There was certainly no act of *this* Court to justify the application of the maxim. On the application and

(1) [1901] 2 Ir. R. 162.

at the request of Mr. Ronan himself, counsel for Mr. Shannon, the Court deferred the consideration of this case until judgment in *M'Kenney's Case* (1) was delivered, because it was said that the judgment in that case would determine what the judgment in this ought to be. I do not think that was any "*actus*" of this Court within the meaning of the maxim. Indeed Mr. Cherry stated, no doubt truly, that he warned Mr. Ronan of the consequence of delay. I am of opinion that on this ground the application should be refused.

There is, however, another clear ground on which this application should be refused. The applicant seeks a mandamus to compel the magistrates to hear and determine the case. The moment the case came before the magistrates it would be their bounden duty to take the necessary formal steps to enable them to receive evidence of those matters which, it is plain they were of opinion, justified them and which most unquestionably would justify them in refusing the certificate.

Mr. Ronan says that they should regard only the condition of things which existed precisely at the moment they refused the certificate on the first occasion, and that their only function would be to grant the certificate, that the position was so rigid that there was no way of moulding it so as to let in proof of those facts which would form the plain foundation of a righteous determination, namely, a refusal of the certificate. It would indeed be a scandal to the administration of justice if this were so. The very form of the mandamus which Mr. Ronan asks for repudiates it; he asks for an order to compel the magistrates "to rehear, and hear, and determine"; and the obvious and most manifest duty of the magistrates would be to call a witness to prove those very facts upon which they had already informally acted upon. I use the expression "*informally*," as applicable only to this part of my judgment.

But now I approach another ground of decision. In my opinion this case is concluded by the decision in *Dempsey's Case*, which was pronounced in this Court on the 21st January, 1884. It was a decision of two very eminent Judges, Chief Justice

(1) [1901] 2 I. R. 162.

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May, and the late Mr. Justice James O'Brien. We have only a newspaper report of the judgment; but we have examined the records of the Court, and the facts and decision were as appearing in the report. That case is precisely in point; it is in fact on all fours with the present. The applicant went into Court (to use the language of Chief Justice May) under the influence of intoxicating liquor. The magistrates on seeing him in this condition refused the application, and there was an application to this Court for a mandamus. It was refused on the ground that the fact of the applicant being drunk in Court was an ample justification of the action of the magistrates in refusing the certificate. I think we should follow that decision; in my opinion it is binding upon us, as is clear from the decision in the *Queen* v. *Justices of Cavan* (1) which was most elaborately argued in this Court. I will not refer to my own judgment, though I dealt with the matter very fully; but certainly nothing could be stronger than Lord Justice Holmes' decision; for, the case having being brought with a view to reversing *Clitheroe's Case* (2), he said that, having regard to the fact that several years had elapsed since *Clitheroe's Case* (2) had been decided, and that an appeal lay to the Court of Appeal, he could not be a party to overruling it, though he thought it wrong.

It is said that *M'Kenney's Case* (3) has practically overruled *Dempsey's Case* I do not think so. *M'Kenney's Case* (3) (the correctness of the judgment in which has since, by 63 & 64 Vict. c. 30, received statutable recognition) was decided on a different Act of Parliament, and the ground of the decision in *M'Kenney's Case* (3) was that there being no police objection there was a statutable obligation to grant the certificate. It turned, as I pointed out during the argument, on the construction of the 3rd section of the Act of 1874. My brother Gibson and I held in this Court that that section plainly indicated that the only ground of refusal to grant the necessary certificate in that case was the substantiation of the police objection with which the section was conversant, and that "in such case" it was competent for the magistrates to refuse the certificate. I think this

(1) 30 L. R. Ir. 140.
(2) I. R. 11 C. L. 412.
(3) [1901] 2 Ir. R. 162.

also was substantially the ground of the decision of Lords Justices Walker and Holmes. They referred at length to the legal history of the spirit grocer's licence, and rested their judgment on the 3rd section of the Act of 1874. There is, in my opinion, nothing comparable to that provision in the 14th section of the Licensing Act of 1874. The very argument which was presented in this case was also presented in *Dempsey's Case*, and was then rejected by the Court, Chief Justice May saying that where the question was a disputed matter of fact as between objector and publican the section as to hearing evidence of oath applied, but that there was nothing in the section to prevent magistrates acting upon what they saw with their own eyes in Court.

The only note of the judgment obtainable is that taken from the daily papers, but this is evidently substantially a correct report of what was said. The Chief Justice is there reported to have said:—

> "It was argued that the applicant need not attend in person at the Court unless required by the Justices or police authorities, and that they should not entertain any objection to the signing of such certificate, or receive any evidence with respect to the same unless on a written notice of an intention to oppose, and that the Justices should not receive any evidence with respect to the signing of such certificate which was not given on oath in open Court. It appeared to him that these regulations were intended to apply to objections grounded on matters of fact, capable of proof on the one side and disproof on the other. The present case did not appear to be open to this observation, for the objection which arose did not require and could not receive prior notice, as it did not exist until manifested by the appearance and the demeanour of the applicant himself, and evidence on oath was not requisite, for the fact was self-evident and ascertained by the sight and hearing of the magistrates themselves. The claimant himself constituted the evidence, and it did not appear that his manifest intoxication was attempted to be questioned. The case, in his opinion, was properly decided on the spot, as no adjournment could be proper or useful under the circumstances."

It is to be borne in mind that the ground of refusal was what the magistrates saw with their own eyes when sitting as magistrates in open Court, and not what they may have heard or collected from the irresponsible gossip out of Court. But, however this may be, *Dempsey's Case* is not overruled and should be

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followed by us. But I must say for myself that the very fact of an applicant for a certificate of good character coming into the presence of the tribunal from which he asked that certificate, in a state of violent intoxication, so violent that it required four policemen to hold him down, was such an utter contempt of Court that the magistrates who composed the Court would be abundantly justified in refusing to hear any such application put forward on behalf of such a man.

As to the last ground, pressed with so much earnestness by Mr. Cherry, that the application should be refused because, as he alleged, there was another available and adequate remedy, namely, an appeal to Quarter Sessions, I do not think it necessary to decide this matter. The question, however, is not concluded by *M'Kenney's Case* (1). Lord Justice Fitz Gibbon agreed with the view of this Court in that case, that an appeal lay, and was an adequate remedy, adopting the language I used in my judgment. Lord Justice Holmes' judgment upon the point rested upon the fact that an appeal was given to the "party" decided against, which, he thought, involved that the appeal section only applied where there were two parties—a party prosecuting and a party prosecuted. The language of the section in this case is different. It does not use the word "party." Any person decided against may appeal. Lord Justice Walker thought that even if an appeal lay, mandamus was the better and more effective remedy. However, in this case it is not necessary to go into the matter, as the case can be disposed of on several other grounds.

The motion would be refused with costs.

MADDEN, J.:—

The prosecutor, James Shannon, being the holder of a publican's licence, applied on the 28th of September, 1899, to the annual licensing petty sessions of his district for the certificate of good character required for the renewal of his licence. He had no difficulty in presenting to the magistrates the statutory certificate signed by six householders. An objection, which had been served by the police, had been withdrawn, and, so far, he was in a position to obtain the required certificate.

(1) [1901] 2 Ir. R. 162.

During the sitting of the Court, however, Mr. Shannon appeared in person "in a state of violent inebriation" (I quote from the affidavit of the resident magistrate, Mr. Kennedy), and conducted himself in such a manner that four policemen were obliged to hold him down, and ultimately to remove him from the precincts of the Court. Shortly before this incident his solicitor had pleaded guilty on his behalf to fifteen charges of drunkenness, disorderly conduct, and assault on the police, on the last-mentioned of which he was ordered to enter into a recognisance in the sum of £50 to keep the peace.

The magistrates then and there refused to certify that he was a man of good character, and the Court of Queen's Bench Division has decided that, in so doing, they were acting within the scope of the authority conferred on them by the Licensing Acts. The case to which I refer, *Dempsey's Case*, was decided in the year 1884. It has not been reported, but the point in question appears clearly from the affidavits and from the order of the Court. There, as here, the applicant for a renewal of a publican's licence appeared at the Licensing Sessions in a state of obvious intoxication. There was no objection, and the magistrates had no evidence before them, save that of their senses. They refused the application, and their order was upheld, on an application for a *certiorari*, by the Court of Queen's Bench.

It is not disputed that this case is precisely in point, but it is said that we ought not to follow it, having regard to the decision sion of the Court of Appeal in *Reg.* (*M'Kenney*) v. *Justices of Antrim* (1).

That was an application for the renewal of a spirit grocer's licence under the provision of the Beerhouses (Ireland) Act, 1874. The majority of the Court of Appeal held that the Justices had no jurisdiction to refuse the statutory certificate, in the absence of such an objection as is contemplated by the 5th section of that Act. The present application is under the 14th section of the Licensing Act, 1874, which deals with a different matter, the renewal of a publican's licence. The personal character of a person entrusted with the management of a licenced publichouse is obviously of more importance to the community than the character of a vendor of goods

(1) [1901] 2 Ir. R. 162.

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across a counter. Accordingly we find provisions applicable to such a case which are not contained in the statute relating to spirit grocers' licences. In the case of a spirit grocer's licence none but the police are competent to object. But it has been decided by this Court that any member of the community is competent to object to the renewal of a publican's licence: *Reg.* (*Lambe*) v. *Justices of Armagh* (1). Again, in the case of a publican's licence the personal attendance at the Sessions of the applicant for a certificate may be required by the Justices or police authorities "for some special cause personal to himself." Chronic intoxication would, I presume, come within these words. Shannon was not required to attend, but he did present himself in the condition which I have described.

Various questions suggest themselves, none of which were discussed, or could have been discussed, in *M'Kenney's Case* (2). Could the Justices take cognisance of the special matter personal to the applicant which occurred before their eyes in open Court? Ought they to have sworn one of the four constables by whom Shannon was removed, to prove that he was drunk? Courts frequently act upon the evidence of their senses in regard to matters which occur in open Court, as when a party is called upon a recognisance, and a warrant is issued upon his non-appearance, and where a person guilty of contempt in the presence of the Court is committed to prison. "The first degree of evidence, and that which, though open to error and misconception, is obviously most satisfactory to the mind, is afforded by our own senses": Taylor, on Evidence, s. 554. "As evidence afforded by our senses is seldom attainable in judicial trials, the law is satisfied with requiring the next best evidence, namely, the testimony of those who can speak from their own personal evidence" (s. 567). Was it not patent to the senses of the Justices, when Shannon had been hustled out of Court in gross and palpable contempt, that there was neither applicant nor application before them, in any real sense of the terms? Does the provision requiring evidence to be taken on oath prevent the Justices from taking cognisance of matters patent to their senses? This last question has been answered in the negative by this Court in *Dempsey's Case*.

(1) [1897] 2 Ir. R. 57.

(2) [1901] 2 Ir. R, 162.

Having regard to these considerations and to the substantial differences which exist between a spirit grocer's licence and a publican's licence, and between the enactments applicable to each, I am not prepared to hold that *Dempsey's Case* has been overruled by the recent decision of the Court of Appeal. Unless I am satisfied on this point I am bound to follow the previous decision of this Court. In taking this course I find myself in excellent company. In *The Queen* v. *Justices of Cavan* (1) this Court was called upon to depart from the decision of their predecessors in *Clitheroe's Case* (2), on the ground that it had been overruled by the House of Lords in *Sharpe* v. *Wakefield* (3). The Court unanimously refused to do so, although one at least of its members was of opinion that the decisions were irreconcileable. My attitude towards the decision in *M'Kenney's Case* (4) is precisely that expressed by O'Brien, J., in the following words:—"The question we have to consider is whether it is certain that the House of Lords would overrule *Clitheroe's Case* (2); whether the principles laid down in *Sharpe* v. *Wakefield* (3) so completely cover the question that we must necessarily come to that conclusion. Now, I am not at least so certain they would take that course as not to leave it to themselves to do it, to say what is the measure of the principles they have laid down (5)." For sixteen years the decision in *Dempsey's Case* has been part of the licensing law of the land. It has afforded some degree of protection to the public against the renewal of licences in the hands of improper persons, and I do not think it is for this Court, unless coerced by plain authority, to withdraw any portion of the protection thus afforded by our predecessors. For these reasons I think the cause shown against the conditional order should be allowed.

BARTON, J., concurred.

Solicitor for applicant: *Mulhall.*
Solicitor for the Justices: *Norris Goddard.*

A. E. R. J.

(1) 30 L. R. Ir. 140.
(2) I. R. 11 C. L. 412.
(3) [1891] A. C. 173.
(4) [1901] 2 Ir. R. 162.
(5) 30 L. R. Ir. 150.

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Nov. 13, 14. 1901.
Feb. 20.
Appeal.
April 19, 22.

POWELL *v.* M'GLYNN & BRADLAW (1).

(1900. No. 5766.)

Master and servant—Master's liability—Negligence of servant—Scope of employment—Evidence of existence of relationship—Admission—Offer to pay money after accident—Burden of proof—Course of trial.

The plaintiff was knocked down and injured by a runaway pony attached to a trap, which had been driven by M., but was left standing by him in the street when it took fright. The pony and trap were the property of B. The plaintiff brought an action against M. and B. for damage for injuries received by the negligence of the defendants or their servants. At the trial a witness for the plaintiff gave evidence of a statement made by M. after the accident, to the effect that he had been driving the pony and trap, and had left them standing in the street, when the pony was startled and ran away. He also proved that after the accident, and after the plaintiff had been brought to hospital, M. claimed the pony and trap and took them away. The plaintiff's daughter proved that B. had called on her after the accident, and said that he was very sorry that they were his pony and trap, and that if she took her father home he would pay all expenses. In cross-examination it appeared that this offer to pay the expenses was made after the plaintiff's daughter had said to B. that she believed he had lent M. the pony and trap, to which observation B. replied with the ejaculation "Humph." Neither B. nor M. were produced at the trial. Counsel for the defendant B. asked the Judge for a direction in his favour, which was refused, and the Judge, amongst other questions, asked the jury to find whether M. was acting as the servant of B. within the scope of his authority. The jury answered this question in the affirmative, and found £250 damages against the defendants. B. moved to have the verdict set aside and the judgment entered for him in the action, on which motion the King's Bench Division made no rule, the Court being equally divided, Lord O'Brien, L.C.J., and Barton, J., being of opinion that there was no evidence to support the finding of the jury that M. was the servant of B., acting within the scope of his authority; Madden and Boyd, JJ., being of opinion that, having regard to the non-production of the defendants, and the offer to pay expenses made by B., there was evidence to support the finding:—

Held, by the Court of Appeal, that there was no evidence to support the finding; that no presumption of the relationship of master and servant arose

(1) Before Lord O'Brien, L.C.J., and Madden, Boyd, and Barton, JJ.

from the fact of M. driving B.'s pony and trap; that the offer to pay expenses was made on the basis of B. having lent the pony and trap to M., and could not be treated as an admission of liability on another hypothesis; that the evidence offered being at least equally consistent with a state of facts on which B. would not be liable, he was entitled to a nonsuit or a direction in his favour, and that the verdict and judgment entered thereon against him should be set aside.

MOTION on behalf of the defendant, J. J. Bradlaw, for an order that the verdict and judgment entered for the plaintiff for the sum of £250 and costs, upon the hearing before the Right Hon. Mr. Justice Gibson and a common jury of the city of Dublin on June 23, 1900, be set aside with costs, and that judgment be entered for the defendant, J. J. Bradlaw, dismissing the plaintiff's action with costs upon the ground of non-direction and misdirection by the learned Judge on the trial in not having directed a verdict for the said defendant, and also on the ground that there was no evidence to go to the jury as against the said defendant, and that there was no evidence to support the finding of the jury to the question No. 4 left to them by the learned Judge, or in the alternative that a new trial be granted to the said defendant on the ground that the findings of the jury upon the questions left to them by the learned Judge were against the evidence and the weight of evidence; and that there was no evidence to support the findings of the jury against the said defendant on the question No. 4 left to them by the learned Judge, and that the findings were unsatisfactory and perverse; or for such other order as the Court might deem right.

The writ of summons in the action named J. M'Glynn and J. J. Bradlaw as defendants, and was endorsed with a claim "for damages for injury to the plaintiff by the negligence of the defendants and their or his servants when in charge of a horse and trap."

The statement of claim averred that "the plaintiff has suffered damage from personal injuries caused by the defendants or their servants on December 24, 1899, negligently driving a horse and trap in Clanbrassil-street, Dublin, or by the negligence of the defendants or their servants when in charge of the said horse and trap," and claimed £1000 damages.

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The defendant, J. J. Bradlaw, in addition to the usual traverses, pleaded that the damage (if any) arose from inevitable accident; that it was caused by contributory negligence on the part of the plaintiff; that it was due to the plaintiff's own negligence; and that the horse and trap were not under his control or management at the time of the accident; nor were they driven or managed by his servant.

Bradlaw asked the plaintiff for particulars of the name or names of the servant or servants or agent of him (Bradlaw) who was or were alleged to be in charge of the horse and trap at the time of the accident. The plaintiff replied that this information was within Bradlaw's knowledge and not within the plaintiff's knowledge.

The defence of the defendant M'Glynn is not necessary to state for the purposes of this report.

At the trial the plaintiff proved that he was struck and knocked down at the middle of a crossing in Clanbrassil-street. He could not say what struck him; he became unconscious at once; he then proved the injuries which he had received. Constable Gleeson stated:—"I was on duty at 5.10 p.m. on December 24 at the corner of Lombard-street. I heard shouts; then a crash; I ran with people to Leonard's corner. The pony and trap were in the middle of the road. Hooligan, a carman, was holding the horse. I went into the druggist's shop and saw the plaintiff, who was then unconscious, and took him to the hospital. M'Glynn came in ten minutes afterwards to the hospital. I asked him was he the owner? He said he was not: that the horse belonged to Mr. Murphy of Harcourt-road, from whom he had it hired: that he had been out driving with two lady friends along with Mr. Purcell, and was leaving them at Longwood-avenue, and when bidding one of them good-bye at the door, some person interfered with a spring-blind in the window, and it shot up suddenly, and the horse ran away. He said nothing about Bradlaw. I said he must accompany me to the station from what the doctor stated. M'Glynn got possession and went away with the horse and trap; he was not charged." This witness when cross-examined by counsel for M'Glynn said—"Murphy has not a livery-stable. He said he had hired it from Murphy."

The plaintiff's son was then produced; he was with his father at the time of the accident, and deposed to picking him up after he was knocked down, though he did not see the accident, as his back was turned. He also deposed to M'Glynn having claimed the horse and trap—a small Ralli car—at the hospital.

Hooligan, the carman, mentioned by Constable Gleeson, described the accident, having seen the plaintiff knocked down by the runaway horse and trap. He added, "I saw the pony at race meetings, and Bradlaw in the trap several times."

A surgeon was then produced to testify to the injuries received by the plaintiff.

Miss Powell, the daughter of the plaintiff, said—"Bradlaw called at 2.30 p.m. on December 25. He asked to see Mr. Powell, by which I understood my brother; I said he was not in, that if he told me his business it would be just the same. He asked how did it happen? I said I did not know, and would like to know. He said he was very sorry it was his pony and trap; and if I liked to do so to take my father home, and he would pay all expenses. I said Dr. Kennedy had seen him. My mother and sister heard the conversation." Cross-examined, the witness said—"When he asked how it happened, 'I said I believe you lent your pony and trap.' He replied with 'Humph!'"

Another carman was then called, who stated that Bradlaw had a small pony that ran away two years ago along the South Circular-road, but he did not know the pony in this case.

Serjeant Dodd, for Bradlaw, and *Harrison*, for M'Glynn, asked for a direction. The learned Judge refused, thinking there was a strong *prima facie* case against M'Glynn, and some evidence supplied by his own language against Bradlaw.

Serjeant Dodd thereupon called Purcell as a witness for the defendant Bradlaw. He said—"I was with M'Glynn on December 24th; he drove; I was on the back seat; Bradlaw was not there; I am employed by him as clerk; I got a lift; the pony was kept at Murphy's."

Harrison examined the witness for M'Glynn: "Bradlaw took the pony and trap to M'Glynn's house about 12 o'clock; I was at M'Glynn's; I did not drive that day; M'Glynn had two ladies out; he is married to one of them since." Cross-examined:

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"Bradlaw is manager of the Dental Association; he goes to race meetings; he is not a bookmaker."

Serjeant Dodd then renewed his application for a direction. No further witnesses were called.

The learned Judge left five questions to the jury, which, with their answers, were as follows:—

1. Was M'Glynn guilty of negligence? Yes.

2. Was such negligence the cause of the misfortune? Yes.

3. Did the plaintiff directly contribute to the misfortune by his own negligence? No.

4. Was M'Glynn acting as servant of Bradlaw within the scope of his authority? Yes.

5. To what damages (if any) is the plaintiff entitled? £250.

The jury accordingly found for the plaintiff against both defendants for £250, and the Judge gave judgment for the plaintiff against both defendants for that sum with costs, but stayed execution to enable the defendant Bradlaw to move to have the verdict and judgment varied or set aside.

Serjeant Dodd, and *Jefferson*, in support of the motion.

Redmond Barry, Q.C., and *Herbert Wilson, contra.*

Cur. adv. vult.

1901. Feb. 20.

BARTON, J.:—

Although the points raised by this case are difficult and interesting, the admitted facts of the case are short and simple. It appears that the plaintiff sustained personal injuries on December 24th, 1899, which were caused by the negligent driving or management of a pony and trap by a person named M'Glynn, who was in charge of it on the occasion in question. The trap was a Ralli cart, a kind of a trap usually used or driven by ladies. On the occasion in question M'Glynn was driving two ladies, one of whom he afterwards married. The plaintiff has recovered a verdict for £250 damages against M'Glynn, and that verdict is not disputed. But the plaintiff was not satisfied with suing M'Glynn, who was the person in charge of the trap, by whose negligence the injuries were caused. He has also joined as defendant another person named

Bradlaw, who was the owner of the trap, but was not present on the occasion in question. In order to have this double remedy, and to maintain this action against the owner Bradlaw, as well as against the actual wrong-doer M'Glynn, it is admitted that it was necessary for him to establish that M'Glynn, the person whose negligence caused the injuries, was the servant of Bradlaw acting within the scope of his authority. Accordingly the learned Judge at the trial left a separate question to the jury: "Was M'Glynn acting as servant of Bradlaw within the scope of his authority"? and the jury answered "Yes." The learned Judge, in view of the findings of the jury, entered judgment against both the defendants, staying execution, however, against Bradlaw, so as to enable him to move this Court, if so advised, to have the verdict varied or set aside.

Under these circumstances this motion comes before us to have this verdict as against Bradlaw set aside, on the ground that there was no evidence to support the finding that "M'Glynn was the servant of Bradlaw acting within the scope of his authority," or in the alternative for a new trial on the ground that that finding was against evidence and the weight of evidence, unsatisfactory and perverse. The Court has taken what has been, perhaps, an unusual time to consider their judgment, with the result that there is a difference of opinion among the members of the Court; but I think we are all agreed that the case, though rather short and simple in its facts, presents nice questions on the law of evidence and burden of proof, which cannot be dismissed by any mere general expression of opinion on one side or the other. The arguments addressed to us and cases cited to us deserve and require careful scrutiny. In any view of the case I think we are also all agreed that the learned Judge was right to leave the question to the jury, and to leave it by way of a special question, thus preventing damages being awarded against a defendant in what Lord Bramwell once referred to as "the scramble" of a general verdict. In considering that finding we must not interfere with the province of the jury. As the learned Judge told the jury, the probability of the case is that it was a loan of this trap by Bradlaw to M'Glynn; but we cannot here decide on probabilities. We cannot disturb the finding unless it was either unsupported by any evidence, or

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in our opinion such a verdict as no jury could reasonably find. Accordingly I turn to the consideration of the question which we have to decide, viz., "Was there any evidence to support this finding that M'Glynn was the servant of Bradlaw acting within the scope of his authority"? It was proved at the trial that Bradlaw had on that morning driven the trap to M'Glynn's house, and that a person named Purcell, a clerk of Bradlaw's, was one of the driving party, sitting behind with one of the ladies, while M'Glynn sat in front with the other. But it was not suggested that these circumstances afforded any evidence to support the finding, and I think it was admitted by the plaintiff's counsel that the only evidence to support the finding was to be found in a conversation between the plaintiff's daughter and Bradlaw on the day after the occurrence, namely, Christmas Day, December 25th, 1900. I shall therefore read the whole of that young lady's evidence, which was very short, bearing in mind always that the issue which this evidence is relied on as supporting is not any general issue, but this very special finding of the jury, that "M'Glynn was the servant of Bradlaw, acting within the scope of his authority." The following is the evidence of plaintiff's daughter as reported to us by the learned Judge—"Bradlaw called at 2.30 p.m. on December 25th. He asked to see Mr. Powell, by which I understood my brother. I said he was not in, that if he told me his business it would be just the same. He asked how did it happen? I said we did not know and would like to know. He said he was very sorry, it was his pony and trap, and if I liked to do so to take my father home, and he would pay all expenses. I said Dr. Kennedy had seen him. My mother and sister heard the conversation." Cross-examined—"When he asked how it happened I said I believe you lent your pony and trap. He replied with 'Humph!'"

I understand that some of the members of the Court are influenced by the use of the expression "Humph!" However, I do not think the decision of this important case can turn upon "Humph!" We have been told that owing to its occurrence in certain famous works of fiction it has found its way into a modern dictionary. However, I do not think that it has yet gained such an established meaning in our language as to enable us to rest a

judicial decision in a serious case upon its signification. I can hardly conceive any witness being indicted for perjury for having falsely sworn that anyone had said "Humph!" If so, it can hardly be regarded as a piece of evidence at all. At all events I decline to base my judgment on the use of this expression. But I venture to think that in other respects the short cross-examination of this witness is very important. It is essential to bear in mind the sequence of the conversation. In a conversation or a correspondence everything depends on the order of the letters or of the dialogue. Immediately before Bradlaw made the offer to pay plaintiff's expenses plaintiff's daughter had said, "I believe you lent the trap"—in other words, "I believe that M'Glynn was not your servant and that you were not liable." It seems to me that this statement by plaintiff's daughter must qualify the reply of the defendant Bradlaw. Every letter in a correspondence, every statement in a dialogue, must have relation to the one preceding it and to the one following it. We must bear in mind that the principle on which an offer of compromise may be evidence against a defendant is that it may amount to an admission. Therefore when you are dealing with a special finding, the offer, if evidence at all, must be evidence as being an admission of the truth of that finding. Can an offer made in reply to a statement by plaintiff's daughter that she believed the pony and trap had been lent to M'Glynn, be evidence to support the opposite hypothesis, namely, that M'Glynn was Bradlaw's servant, acting within the scope of his authority? It seems to me contrary to good faith and to public policy to allow an offer made on the basis of one state of facts to be treated as an admission of and as evidence of an opposite proposition, and I do not think that any jury could reasonably come to such a conclusion.

But quite apart from this consideration the offer itself has none of the marks of an offer of compromise, and all the marks of an offer of kindness by a person who makes the offer; because, though not liable, he was the owner of the trap which caused the injuries. There was nothing said about "settling" or "compromising"; no sum of money was offered; no claim or complaint had been made. The offer was not to pay any sum in the nature of compensation or damages, but merely to pay "expenses."

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I can find no case in which such an offer, quite irrespective of what the plaintiff's daughter said, has ever been held to support such a formidable structure as this finding that one man was the servant of another acting within the scope of his authority.

This case raises the question, how far and under what circumstances an offer made by defendant to plaintiff may be evidence either of general liability or to support any particular finding, and I shall briefly refer to all the authorities which have been cited, and I think it will be clear that to hold that this offer, as deposed to in the case, can be evidence to support this finding, as found in the case, goes beyond any case hitherto decided.

The rule, as laid down in Roscoe's Nisi Prius, is as follows (16th edition, p. 62)—"Admissions made with a view to compromise and in order to bring peace are not evidence against the maker," and he refers to Buller's Nisi Prius, p. 236, where that proposition is forcibly supported. Roscoe then states the cases in which they are evidence, as follows—"An offer of a specific sum by way of compromise is evidence unless accompanied with a caution that the offer is confidential or without prejudice," and he refers to two cases, *Nicholson* v. *Smith* (1) and *Wallace* v. *Small* (2). A reference to these cases will show how far short they are of being analogous to the present case.

Nicholson v. *Smith* (1) was an action of *assumpsit* to recover £245, price of goods sold. After other evidence had failed the plaintiffs proved that the defendant, after action was brought, went to plaintiffs, and said that he was sorry that such a thing should have happened, and that he would give £200 to settle the thing. Lord Tenterden, then Chief Justice Abbott, thereupon observed—"As he says that he will give such a sum of money to settle the debt I think I cannot reject the evidence."

The other case was *Wallace* v. *Small* (2). That was a case of *assumpsit* on a charter party. There was some difficulty in fixing the defendant with the contract. It appeared, however, that after the action was brought an offer of "a specific sum" had been made, and that a friend of plaintiff had gone to defendants and advised them to increase their offer, and that the defendants refused to do so, saying, "We shall lose enough by the charter party as

(1) 3 Stark N. P. R. 128. (2) M. & M. 446.

it is." The witness stated that nothing was said about the communication being without prejudice. The evidence was objected to. Lord Tenterden, however, admitted it, and said he thought it good *prima facie* evidence of liability. It is not said to be without prejudice, and an offer of compromise may be very well made without any restriction as to confidence.

I think these two cases show how justified are the cautious terms in which the rule is stated in Roscoe's Nisi Prius. Both were offers of specific sums in action of contract made after action brought, without any restriction as to confidence on either side.

In the argument at the bar only three cases of tort were cited, in which it was argued that offers of compromise have been held to be sufficient evidence of liability. These cases were *Illidge* v. *Goodwin* (1), *Sayers* v. *Walsh* (2), and *Thomas* v. *Morgan* (3). *Illidge* v. *Goodwin* (1), which is usually cited on another point, was cited here, because at the end of the case Tindal, C.J., is reported to have said—"I think upon the evidence before me I must take him" (*i.e.* Joseph Goodwin, senior) "to be the defendant. There is evidence enough. He offered to pay money." This observation, standing by itself, was offered to us as an authority for the proposition that an offer to pay money is evidence enough against any defendant in any case. But these short *dicta* in cases in Carrington and Payne's Reports require to be carefully scrutinised. Blackburn, J., in his judgment in *Readhead* v. *Midland Railway Company* (4), said of some cases cited from Carrington and Payne's Reports—"These are, it is true, only Nisi Prius decisions, and neither reporter has such a character for intelligence and accuracy as to make it at all certain that the facts are correctly stated, or that the opinion of the Judge was rightly understood." These words were quoted and adopted in the unanimous judgment of the six Judges in the Court of Exchequer Chamber (5), and should be borne in mind, when we are asked to apply mere *dicta* in these short reports to important questions of principle, particularly in a case like *Illidge* v. *Goodwin* (1), which has otherwise not escaped comment (see Bevan on Negligence, p. 959). Accordingly it is

(1) 5 C. & P. 190.
(2) 12 I. L. R. 435.
(3) 2 C. M. & R. 496.
(4) L. R. 2 Q. B. at p. 437.
(5) L. R. 4 Q. B. at p. 388.

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necessary to read this case of *Illidge* v. *Goodwin* (1) carefully, and, if it be read carefully, I think it will be seen that the offer of money was not really treated by the Judge as an admission or as evidence of liability. In fact, I cannot find any direct reference to it in the evidence. But it became material on a secondary point as to which of two men named Joseph Goodwin, father or son, was the defendant in the case, and it was on this point of identity alone that the Judge treated the offer of money by one of them as "evidence enough," not that he was liable, because the liability was otherwise established, but that the father was the defendant and not the son.

I have dealt with this case fully, because to a careless reader it might appear to have some bearing on the present case. Indeed, I think the distinction was quite recognised by counsel for plaintiff, and *Illidge* v. *Goodwin* (1) was not seriously relied on by them.

The other two cases were referred to by the learned Judge in his report, namely, *Sayers* v. *Walsh* (2) and *Thomas* v. *Morgan* (3), both cases of injury from the bite of dogs, in which the issue was the defendant's knowledge of the fierceness of the dog, otherwise called the scienter, which was, I venture to think, a somewhat different class of issue from the finding in the present case. I do not think *Sayers* v. *Walsh* (2) has any bearing on the present case. It was proved in that case that the dog had been kept tied up, and that the defendant had said after the occurrence that "he was sorry the dog had been allowed to slip out," a very significant remark. It is evident from the observations of Pennefather, B., in the course of the argument, that it was this admission and not any offer of compromise that was the ground of that decision. If it had been proved in this case that Bradlaw had said that he was sorry he had sent his servant out with the trap *Sayers* v. *Walsh* (2) might help us. But there is no such admission in this case, which is entirely different.

Thomas v. *Morgan* (3) is more to the point. The defendant, when told that the dogs had killed plaintiff's cattle, said that "if they had done it he would settle for it." The word "settle" savours more of compromise and less of charity than anything

(1) 5 C. & P. 190. (2) 12 I. L. R. 435. (3) 2 C. M. & R. 496.

said by Bradlaw in this case; but the Judge did not consider this offer to be evidence of the scienter and non-suited the plaintiff. The Court held that, strictly speaking, the statement of the defendant ought to have been submitted to the jury, but with strong observations in favour of the defendant; but they declined to disturb the non-suit. I think the Court must have considered that a verdict for the plaintiff founded on such slight evidence would have been unsatisfactory, otherwise they would have granted a new trial. But I wonder what Parke, B., who delivered the judgment of the Court in that case, would have said if this offer to settle had been made in answer to a statement by the plaintiff that he (plaintiff) believed the dogs were quite quiet, or that the defendant had no reason to think the contrary? And, furthermore, I wonder what Parke, B., would have said if that case had been cited to him as an authority for supporting on such slender evidence a finding relating to the serious and complex principle of the responsibility of a master for the civil wrong of a servant, which that learned Judge a few years afterwards helped to establish in the case of *Quarman* v. *Burnett* (1), where (at p. 509) he said—"The person is liable who stood in the relation of master to the wrongdoer, he who had selected him as his servant from his knowledge of or belief in his skill and care, and who could remove him for misconduct, whose orders he was bound to obey."

After all, I think that the issue of scienter in a dog bite case is not the best guide for us in the present case. It is, of course, a well-known rule that when a dog has bitten a person, or sheep, or cattle, the burden of proving the defendant's knowledge of the fierceness of the animal lies on the plaintiff. But a dog-bite case is a very special class of case. Blackburn, J., once said that this rule about scienter was settled "by authority rather than reason": *Smith* v. *Cook* (2). A high authority has spoken of "the absurd doctrine of scienter as applicable to mischievous dogs" (Taylor on Evidence, p. 690). Without in the least disparaging that well-known rule, I would like to test the matter by some more important and more appropriate illustrations, and I shall take my illustrations from cases where the point at issue is peculiarly within the

(1) 6 M. & W. 499. (2) 1 Q. B. D. at p. 82.

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knowledge of the opposite party. In a libel case where the Judge has ruled the occasion privileged and puts the question of malice to the jury, or in an action for malicious prosecution where the Judge puts a separate question as to malice to the jury, I do not think that a finding of malice against the defendant could be supported, if the only evidence of malice was an offer of compensation, and especially if that offer had been made in reply to a statement by or on behalf of the plaintiff that he believed the defendant had acted *bona fide* under an honest belief and sense of duty. These would, perhaps, be stronger cases than the present case, but in principle I can see no difference. The point is, can such an offer as this be regarded as an admission of the truth of this special finding? If it cannot, then, I think, the verdict cannot stand. Let us take the example of an action for fraudulent representation, where the Judge may put a number of questions to the jury, including a question as to the defendant's knowledge of the falsity of the representation. I do not think a finding against the defendant on that issue could be supported, if the only evidence was an offer of compromise, especially if made in answer to a statement that plaintiff believed defendant was ignorant of the falsity of the representation and reasonably believed it to be quite true. If I am right in thinking that on issues such as those of fraud or malice mere evidence of an offer of compensation (especially if made in the course of a conversation such as we have in this case) ought not to support a finding against the defendant, where are we to draw the line?

Let us take example from an every-day case of railway negligence or running down, where the Judge may, in order to try the case properly and justly, put to the jury some special question as to the actual negligence charged, *e.g.*, "Did the engine-driver whistle before coming to the level crossing"? or in a running down case, "Was the defendant's van being driven on the wrong side of the road"? Would a finding in the former case, that the engine-driver did not whistle, or in the latter case that the van was driven on the wrong side, be supported in the absence of any evidence of either of those facts, merely by an offer of compensation for the injuries sustained? To make the cases more analogous to the present case, would this offer of compensation be considered

by itself sufficient evidence, if, immediately before the offer was made, the plaintiff in the former case had said, "I know that the engine-driver whistled all right," or in the latter case had said, "I know that your van was on the right side of the road."

The responsibility of master for servant is not by any means the least complicated branch of the law of civil liability. Hundreds of cases illustrate the nice distinctions which the Courts have drawn in order to keep that responsibility within just limits. It seems going very far to say that, in the absence of any evidence of the existence of the relation of master and servant, an offer, such as we have here, is to sweep away all difficulties and niceties, and to support a verdict that a wrong-doer is the servant of another acting within the scope of his employment. A case of *Brown* v. *Wren Brothers* (1) was not cited in argument, but has been brought to our notice by Mr. Justice Boyd. In that case a letter of one of the defendants, admitting that he had been partner in defendant's firm, but alleging that the partnership had ceased, was held to be evidence to go to the jury that the partnership continued, because, by admitting that he had been a partner, he raised against himself the well-known presumption that the partnership continues until the contrary is proved, and his denial of its continuance was only evidence in his favour on that point and no more. There are many such presumptions in favour of the continuance of personal relations when once admitted, *e.g.*, partnership, agency, tenancy, etc. (see Taylor on Evidence, paragraph 196, 8th edition, p. 214). Where we have a case of an admission of the existence of any such personal relations that case will be a useful authority, but I do not think it can apply to this case, unless, indeed, ownership of a horse and trap raises a presumption that the driver is a servant acting within the scope of his employment, which, I think, cannot be successfully contended. Mr. Redmond Barry, however, did go so far as to argue that the admission of ownership shifted the burden of proof, and cast on the defendant Bradlaw the burden of showing that M'Glynn was not his servant acting within the scope of his authority. He relied on the case of *Hibbs* v. *Ross* (2), which was the case of a ship

(1) [1895] 1 Q. B. 390. (2) L. R. 1 Q. B. 534.

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in dock decided on principles applicable to ships alone. Blackburn, J., in his judgment at p. 543 makes this clear. He says—"Ships are most commonly in the employment of the owners, and consequently proof of ownership is evidence tending to prove that the persons proved to be owners of the ship are the employers of those having the actual control of the ship." The case is cited in Taylor on Evidence under the head of Presumptions of Maritime Law (pp. 207–208, 8th edition, pp. 225–227), by which certain presumptions are made in favour of registered owners of ships (*e.g.*, in salvage cases), and certain other presumptions made against registered owners of ships, as to liability for the negligence and for the contracts of the ship's master. Mr. Barry also referred to the case of *Joyce* v. *Capel and Slaughter* (1). But that was a very different case. Even from the short and sketchy report of that case it appears that there was evidence that the barge had defendant's name and registered number on it, and that it was being navigated by a bargeman. If we had in this case a delivery cart with defendant's name on it driven by a servant it would be a similar case, but it is just because all these elements of master and servant are wanting that this case presents so much difficulty.

But really this suggestion that ownership of a horse and trap raises a presumption of the relation of master and servant, and of acting within the scope of authority, can be controverted by referring to almost any case where the liability of a master for his servant's negligence has been discussed. A recent case in the October number of the Law Reports of 1900, *Beard* v. *London General Omnibus Company* (2), shows how far the Court of Appeal in England go in requiring the onus to be discharged in cases of this kind. The plaintiff was injured by the negligent driving of an omnibus. The omnibus was being driven not by the driver but by the conductor, who, for the purpose of turning it for the return journey, drove it at a considerable pace through some by-streets. Here was a case of admitted negligence by a person admitted to be a servant of the defendants, who admittedly were the owners of the omnibus, doing an act which was admittedly necessary for their business; but, because no evidence was given that the con-

(1) 8 C. & P. 370. (2) [1900] 2 Q. B. 530.

ductor was authorised to drive the omnibus in the absence of the driver, the Judge entered a verdict for the defendant, and the Court of Appeal held that he was right and that plaintiff had not discharged himself from the burden cast upon him of showing that the injury was due to the negligence of a servant of the defendants acting within the scope of his employment. In the same connexion I may refer to the Irish case which was mentioned in the course of the argument, *Cormack* v. *Digby* (1). In that case the plaintiff was injured by the negligent driving of a trap, and the question was whether the master was liable for the negligence of the driver. The driver was admittedly the servant of the defendant, who was admittedly the owner of the trap, and the servant was going to the neighbouring town partly on his master's business and partly on his own. Yet the Court refused to hold, as a matter of law, that the master was liable. The case differs from this because it came before the Court on a motion to disturb a verdict directed for the defendant, and not a verdict found for the plaintiff. But it shows how seriously the Courts regard the burden of proof in cases turning on the responsibility of a master for a servant's negligence, even where ownership is proved or admitted.

In the face of these cases, and many others of the same kind, I cannot see how it can be contended that ownership affords any presumption of liability, or at all shifts the onus from the plaintiff to a defendant in a case of this kind.

In the same connexion Mr. Redmond Barry argued that this was a matter peculiarly within defendant's knowledge, and that he was not examined as a witness. But I think it is quite a mistake to suppose that it is a rule of Nisi Prius, that, where a matter is shown to be peculiarly within defendant's knowledge, the onus of proof is shifted to him. It is true that in some old cases under the Game Law Acts, and in some modern statutes, the burden of proof has been shifted to a defendant on grounds of public policy and convenience, or of the difficulty of proving a fact peculiarly within the knowledge of the opposite party.

A familiar instance is afforded by cases where the burden of proving the possession of a certificate or qualification is thrown on

(1) I. R. 9 C. L. 557.

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the defendant by statute. But there is no such general rule applicable to a case like this. The matter is clearly put by Bowen, L.J., in *Abrath* v. *North Eastern Railway Company* (1), where he says, at p. 457—"It has been said that an exception exists in those cases where the facts lie peculiarly within the knowledge of the opposite party. The counsel for the plaintiff has not gone so far as to say that in all such cases the onus shifts, and that the person in whose knowledge the truth lies is bound to prove or disprove the matter in dispute. This cannot be maintained, and the Game Laws cases can be explained on special grounds." I venture to think that the fact that the defendant was not produced with reference to a matter peculiarly within his own knowledge might serve to reduce the quantum of evidence necessary to establish the plaintiff's case, but it cannot supply the want of evidence or shift the burden of proof.

In the Judge's report there is a statement that counsel for plaintiff stated that Bradlaw had been seen in Court on the previous day. I do not think we can notice such a statement by counsel. Counsel speak from instructions which are not infallible, and no question was put to the witness Purcell about it.

It might be suggested that, if this conversation was admissible evidence in the case at all, we ought not to disturb the verdict of the jury. But that suggestion gives the go-by to the fact that we are dealing here with a special finding. The conversation may be evidence of many things; but is it evidence to support the particular finding that "M'Glynn was Bradlaw's servant acting within the scope of his authority"? In my opinion if it stood alone unqualified by anything it would not amount to evidence to support that finding. In the second place, I think that as it was made in answer to a statement by the plaintiff's daughter that she believed that the pony and trap were lent, the jury could not reasonably on such evidence arrive at the contrary hypothesis. In the third place, I think that the burden of proof is not shifted by the mere fact of ownership, or by the mere assertion of something peculiarly within the knowledge of the defendant. If I thought that there was any scintilla of evidence relevant to this particular

(1) 11 Q. B. D. 440

issue, I would hold that the verdict was against evidence and the weight of evidence, such a verdict as no jury could reasonably find. But in my view of the case a new trial is not necessary. I think there was no evidence to support the finding that the defendant M'Glynn was the servant of the defendant Bradlaw acting within the scope of his authority. Accordingly, I think that the verdict against the defendant Bradlaw should be set aside and a verdict entered for him, leaving the verdict against the defendant M'Glynn undisturbed.

BOYD, J.:—

This case comes before the Court upon a motion by the defendant Bradlaw to have the verdict found for the plaintiff set aside, or to have judgment entered for the said defendant on the grounds of misdirection and non-direction of the learned Judge (Mr. Justice Gibson) who tried the case, and on the ground that there was no evidence to go to the jury against the said defendant, and that there was no evidence to support the finding of the jury on the fourth question submitted to them.

The action was brought by the plaintiff against the defendants to recover damages for personal injuries sustained by him, caused by the negligence of the defendants or their servants when in charge of a horse and trap. The defences of the defendant Bradlaw to this action were: 1, a denial of negligence, 2; inevitable accident; 3, contributory negligence; 4, that the accident was caused solely by the plaintiff's own negligence; 5, a denial that the said defendant was the owner of the horse and trap; and, 6, that the horse and trap were not under the control or management of the said defendant at the time of the accident, nor were they driven or managed by the said defendant's servant.

It is only necessary to refer to the last of the said defences, as it was clearly proved at the trial that the horse and trap, having been left on the street unattended by anyone, the horse was frightened and ran away, and, while so running away, struck the plaintiff and knocked him down, inflicting upon him very serious injuries. No question now arises, or has been argued before us, except as to the liability of the said defendant for

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the injuries sustained by the plaintiff. On this point the learned Judge left the following issue to the jury:—"Was M'Glynn acting as servant of Bradlaw within the scope of his authority."

At the close of the plaintiff's case, Mr. Serjeant Dodd, for the defendant Bradlaw, asked for a direction, and repeated his application at the close of the case; but the learned Judge declined so to direct, as he was of opinion there was a *prima facie* case made by the plaintiff, which could not be withdrawn from the jury, and which at the close of the case had not been displaced by any evidence given for the said defendant.

It appeared from the evidence given on behalf of the plaintiff that the said defendant Bradlaw was the owner of the horse and trap; that on the day of the accident the defendant M'Glynn was driving the horse, and was accompanied in the trap by two ladies and a man named Purcell, who was a clerk of the defendant Bradlaw; and that on their return to the house the horse was left standing on the street, with no one minding him, and that the horse then took fright, and ran away, and knocked down and seriously injured the plaintiff, who happened to be crossing the street. The plaintiff was taken to hospital, and in about ten minutes afterwards, M'Glynn called at the hospital, and there saw Constable Gleeson, who had witnessed the accident and had brought the plaintiff to the hospital. The constable asked M'Glynn was he the owner of the horse and trap, and he said he was not, that the horse belonged to Mr. Murphy, of Harcourt-road, from whom he had hired it, and he had been out driving with two lady friends along with Mr. Purcell. He said nothing about Bradlaw. Another witness stated that at the hospital M'Glynn claimed the horse and trap. Another witness (Hooligan), a licensed carman, proved that he saw the pony at race meetings, and Bradlaw in the trap, several times. Miss Powell, daughter of the plaintiff, was examined, and proved that about 2.30 o'clock on the 25th December (the day after the accident) Bradlaw called at plaintiff's house, and asked her, "How did it happen?" and that she said she did not know, and would like to know. "He said he was very sorry it was his pony and trap, and if I liked to do so to take my father home, and he would pay all expenses." She further, on cross-examination, stated: "I said I believe you

lent your pony and trap." He replied with, "Humph!" Apparently there was some vague rumour that Bradlaw had lent the pony and trap to M'Glynn, but there was no proof that such was the fact. This was all the evidence given by the plaintiff material to the question now before us. Serjeant Dodd for Bradlaw, and Mr. Harrison for M'Glynn, on this evidence asked for a direction, but the learned Judge declined to direct at that stage, as he considered there was a strong *prima facie* case against M'Glynn, and there was some evidence supplied by his own language against Bradlaw, and he referred to the cases of *Sayers* v. *Walsh* (1) and *Thomas* v. *Morgan* (2). In both of these cases it was held that an offer of compensation by a defendant was some evidence of liability. In *Illidge* v. *Goodwin* (3) the same principle was laid down, and Tindal, C.J., stated: "There is evidence enough. He offered to pay money."

In *Joyce* v. *Capel and Slaughter* (4) Lord Denman states the law as follows:—"If the barge was on hire that will be for the defendants to show. The barge being the barge of the defendants, there is *prima facie* evidence that the bargeman was their servant till they explain it."

In the present case there is no doubt, notwithstanding the evasive and untrue statements of the defendant M'Glynn to Constable Gleeson as to the hiring by him of the horse from Murphy, that both the horse and trap belonged to Bradlaw. On the day after the accident Bradlaw admitted the fact, and at the same time offered to pay all expenses. Unless he, or a person for whose acts he was responsible, was in charge of the horse and trap, he would have been under no liability to do so, and I, therefore, am of opinion this offer, so made by him, was evidence of an admission by him of his liability, which should be submitted to the jury, and that the Judge was right in declining to direct a verdict for the defendants at the close of the plaintiff's case.

Was this evidence so given, on behalf of the plaintiff, contradicted or explained by any evidence given on behalf of the defendants? The defendants were not produced as witnesses,

(1) 12 Ir. L. R. 435.
(2) 2 C. M. & R. 496.
(3) 5 C. & P. 190.
(4) 8 C. & P. 370.

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and the only person called as a witness on their behalf did not in any particular displace or explain away the evidence for the plaintiff. On the contrary, in my opinion this witness rather strengthened it. He stated that Bradlaw himself "took the pony and trap to M'Glynn's house," and there was no evidence given by him or by anyone that Bradlaw lent them to M'Glynn, or that the latter was not acting as the servant or agent of Bradlaw in taking the ladies out for a drive. Except the statement by counsel, no explanation was given for the non-production of the defendants, who could have explained the matter, and it was a curious and suspicious circumstance that though Bradlaw was seen in Court the previous day, as stated by plaintiff's counsel, and not controverted by the defendants' counsel, he did not appear at the trial. The learned Judge in his report states that he "saw no explanation for the non-production of Bradlaw, save that he could not help the case." No objection was taken to the Judge's charge in which he explained to the jury the circumstances which would render the defendant Bradlaw not liable for the injuries, nor was there any objection to any of the questions left by him to the jury. The Judge also reports that Purcell (Bradlaw's clerk), the only witness examined for the defendants, "was not asked as to the cause of the accident, or how the pony came to be driven by M'Glynn, or where the party went," and that he, Purcell, "seemed anxious to screen Bradlaw, or to keep something back." On the whole case I am of opinion that there was evidence which should be submitted to the jury, and which the Judge could not properly have withdrawn from their consideration.

In the case of *Brown* v. *Wren Brothers* (1), the only evidence given by the plaintiff, that one Wm. Wren was a partner in the firm at the date when the goods were supplied for the price of which the action was brought, was a letter written by him to a third person prior to the supply of the goods, in which he stated that he had ceased to be a partner some time previously. The County Court Judge held that the implied admission that he had once been a partner could not be separated from the statement,

(1) [1895] 1 Q. B. 390.

that he had ceased to be a partner before the goods were supplied, and withdrew the case from the jury. On appeal, the Court of Queen's Bench reversed his decision, and held that it was for the jury to determine as to the weight of the evidence as to the dissolution of the partnership as against the admission of his having been a partner.

In *Hibbs* v. *Ross* (1), the question was, whether proof of ownership of a ship laid up in dock was *prima facie* evidence of the employment by the owner of the caretaker on board, so as to make him liable for injuries resulting from the negligence of the caretaker. Blackburn, J., page 548, after stating several circumstances in which the owner would not be liable, says, "But these are all exceptional cases, and the facts lie so entirely in the knowledge of the defendant, and may so easily be proved by him, that I think a jury would be fully warranted in acting on the *prima facie* inference that the persons having the actual custody of the ship are employed by the owners, unless some evidence to the contrary is given." In this case it has been established that Bradlaw was the owner of the horse and trap, and, moreover, was in actual charge of it in the early part of the day when the accident occurred, and the facts under which he transferred the charge of them to M'Glynn, lay so entirely within his knowledge that the jury were warranted, in the absence of such evidence, in finding a verdict against him.

I therefore am of opinion that the present application should be refused.

MADDEN, J.:—

The relation existing between Bradlaw, the owner of the trap, and M'Glynn the driver, is a matter peculiarly within their knowledge. Neither was produced at the trial. But before the jury were at liberty to draw any conclusion from this circumstance it was necessary for the plaintiff to adduce some evidence sufficient to shift the burden of proof which rested on him in the first instance. The mere fact of ownership is not, in my opinion, sufficient. There must be something more. In the case of the

(1) L. R. 1 Q. B. 534.

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barge, *Joyce* v. *Capel* (1) (for example), referred to by my brother Boyd, the bargemen were certainly the servants of someone, and it was reasonable to assume, in the absence of evidence to the contrary, that they were in the employment of the owner of the barge. Apart from the evidence supplied by the statements of the defendant Bradlaw, there is nothing to show in what capacity or right M'Glynn was in possession of the trap. This being so, I do not think the jury would have been at liberty to draw any conclusion as to the responsibility of Bradlaw for M'Glynn's acts from the mere fact of ownership. But the something more which is required in order to shift the burden of proof was, in my opinion, supplied by Bradlaw. He expressed regret, and offered to pay money. This was evidence against him in the nature of an admission, which could not in my opinion have been withdrawn from the jury. It might have been explained. But in the absence of an explanation, the jury were at liberty, in drawing an inference from Bradlaw's action, to have regard to the fact that he was not produced as a witness. They were not bound to believe a word that Purcell said. His evidence, if believed, would suggest the conclusion that the trap was lent to M'Glynn. The jury, in rejecting this conclusion, probably thought that Purcell was as ready to bear false witness on behalf of Bradlaw as M'Glynn appeared to be when asked about the ownership of the trap and pony.

I cannot regard Bradlaw's offer to pay money for expenses as having been made on the assumption that the trap had been lent to M'Glynn, and as tantamount to an offer made without prejudice. On the contrary, before the offer was made, and when the plaintiff's daughter had spoken of a loan to M'Glynn the suggestion elicited an ejaculation, the precise significance of which may be a matter of doubt, but which has never been regarded as expression of assent. I agree with my brother Barton in attaching no importance to the word "humph." But if it were necessary to interpret it, I should not feel sufficient confidence in my own literary judgment to brush aside the authority of the New English Dictionary (founded on the usage of Sir Walter Scott and of Miss Austin), which describes the

(1) 8 C. & P. 370.

word "humph" as an expression of doubt or dissatisfaction. For my part, I should seek no higher authority than these great writers of the English language, even though they may be described as "certain novelists." But the question is not what "humph" means, but what it does not mean. And it is no more an expression of assent or an adoption of the statements or sentiments by which it is elicited than was Mr. Burchell's "fudge." We have, then, a suggestion made by the plaintiff's daughter, which would have exonerated Bradlaw, but which, for some reason or another, he did not see his way to adopt, followed by an expression of regret and an offer to pay money. All this might have been explained. But when it was unexplained, I think the jury were at liberty to infer from the non-production of Bradlaw as a witness that no explanation could be given which would free him from responsibility. The evidence, and the demeanour of the witness who was produced, were for the jury, and I cannot say that they were unreasonable in refusing to draw from his evidence the inference which it would seem to suggest if believed. From these reasons I agree with my brother Boyd in thinking that the case was properly left to the jury by Gibson, J., and that the verdict ought to stand.

LORD O'BRIEN, L.C.J.:—

This is a case of some interest from a legal point of view. I am of opinion that the verdict against the defendant Bradlaw should be set aside on the grounds, first, that there was no evidence to go to the jury as against him, and, secondly, assuming that there was some evidence that could not be withdrawn from the jury, that on the facts proved such verdict was against the weight of evidence. The case was argued very earnestly on behalf of Bradlaw by Mr. Serjeant Dodd, who, both in notice of motion and in argument, stigmatised the verdict as perverse. Whatever may be the true view of the case, most certainly the learned serjeant convinced me that he believed there was a grave miscarriage in the result which has been arrived at by the jury. I do not say that if I were the Judge who tried the case, though I thought there was no evidence to go the jury, I would not have done as my brother Gibson did in leaving the question to the

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jury. If the case is at all arguable it is the usual course to leave the case to the jury so as to prevent the necessity of a new trial, but reserve the consideration of the case for the Court *in banc.* Indeed the difference in opinion which exists is the best justification of the action of the learned Judge in leaving the question to the jury. I now proceed to consider the two questions which have been argued:—1st. Was there evidence to go to the jury? 2nd. Assuming there was evidence to go to the jury, was the verdict against the weight of the evidence?

At the close of the plaintiff's case Serjeant Dodd asked for a direction, and persisted throughout in this requisition. The learned Judge, however, left to the jury the question "Was M'Glynn acting as servant of Bradlaw within the scope of his authority," and the jury found in the affirmative. The learned Judge in his report says:—"There was strong *prima facie* evidence against M'Glynn, and there was some evidence supplied by his own language against Bradlaw," and he cites *Sayers* v. *Walsh* (1), and *Thomas* v. *Morgan* (2). The language of Bradlaw referred to by the learned Judge is to be found in the evidence of the plaintiff's daughter, which is as follows:—"Bradlaw called at 2.30, p.m., on December 25th. He asked to see Mr. Powell, by which I understood my brother. I said he was not in, that if he told me his business it would be just the same. He asked how did it happen, and I said we did not know, and would like to know. *He said he was very sorry it was his pony and trap,* and if I liked to do so to take my father home, and he would pay all expenses. I said Dr. Kennedy had seen him. My mother and sister heard the conversation." Cross-examined, "When he asked how it happened," I said, "I believe you lent your pony and trap," he replied with "Humph!" "Humph!" would appear to me to express a dissatisfied condition of mind and nothing more—and no doubt in any view the accident was to be deplored. He appears to me to have thought that the mere lending of the pony and trap would fix him with liability. But looking at what he said as a whole, what was its meaning and effect? Most certainly, in my view, it was not an admission of liability, and an offer to

(1) 12 I. L. R. 435. (2) 2 C. M. & R. 496.

compromise on the basis that M'Glynn has his servant acting within the scope of his authority; but simply an offer, because the pony and trap which did the mischief, which were factors in the occurrence, were his, to pay the expenses of taking the plaintiff home, and *perhaps* something towards medical expense—a very different thing from admitting liability. It will be observed that he asked the question how did it occur, and that the lady answered —she heard he had lent the pony and trap. He so far simply inquired, and she gave an answer which freed him from liability, and it will be further observed that the offer to pay the expenses was in connexion with, and preceded by, the statement that the pony and trap were his. Indeed the fact that the pony and trap were his was assigned as a reason for making the offer he did make, and the "Humph" came after a statement by the witness that she heard that he had lent the pony and trap which, if true, though he may have thought it would fix him with liability, would in reality have established him in immunity from all liability. Let me test the case by an example. I own a Ralli cart; a person, not a servant, but a gentleman, is driving it along the road, and he negligently drives over and injures a man; I am not there at all. Is it to be said that because the trap was mine that this is evidence that the person driving it was my servant, and acting within the scope of his authority? To go a step further. Suppose that the injured man is taken to a house on the roadside, and I go into the house and say to his wife, who is present, "Well, it is my trap, take him home and I will pay the expense and, *perhaps*, something to the doctor." To hold that this was evidence that the person driving was acting as my servant, and within the scope of his authority, would, in my opinion, be to act without legal sanction, and in a manner calculated to stay the hand of kindness, charity, and compassion. My opinion to this effect rests upon a consideration of decided cases.

I now proceed to deal with the cases referred to by the learned Judge—*Sayers* v. *Walsh* (1), and *Thomas* v. *Morgan* (2). I think *Sayers* v. *Walsh* (1) is an authority in favour of the defendant. There was, in that case, an offer of money, but there was some-

(1) 12 I. L. R. 435. (2) 2 C. M. & R. 496.

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thing additional: there was the statement of the defendant that "he was sorry that the dog had been let slip out," and it was on this statement, and not upon the offer of money, that the Court relied. Pennefather, B., says, "I think that the jury were at liberty to infer knowledge from the dog having been previously tied up, and the defendant's saying that he was sorry that the dog had been let slip out." And referring to *Thomas* v. *Morgan* (1), which was evidently referred to as an authority for the defendant, he said, "That case wants one other ingredient in this case, that the defendant said 'the dog had slipped out'; there was no direct evidence in that case that the defendant knew that the dog was wicked." *Sayers* v. *Walsh* (2), then, I think, goes the whole way of being an authority in favour of the defendant Bradlaw.

I come now to *Thomas* v. *Morgan* (1). That was an action for injury to the plaintiff's cattle by the defendant's dogs. The defendant on being informed that his dogs had bitten the plaintiff's cattle offered to *settle* for them if it could be proved that his dogs had done it, and it was held that this was some evidence to go to the jury of the *scienter*, though entitled to but little weight. The offer there was, "Prove my dogs bit your cattle and I will pay the damage"—in other words, the only condition on which the defendant insisted was proof of the biting of the cattle; he admitted all the other elements of liability. He most certainly impliedly admitted the scienter which was the matter in controversy. The condition made was proof that the dogs bit the cattle and nothing more. It is to be observed, moreover, that the offer was to *settle for* them—that is, for all the loss caused by the cattle having been bitten; in the present case the defendant only offered to pay the expenses, and perhaps something for the doctor. The offer, therefore, in *Thomas* v. *Morgan* (1) went farther, very much farther, indeed, than what took place in the present case. In the present case what was said did not amount to an offer of *compromise*. The word "settle," which was the word used in *Thomas* v. *Morgan* (1) clearly indicated *compromise*. Yet in that case Baron Parke said—"But though we think, strictly speaking, it (that is

(1) 2 C. M. & R. 496. (2) 12 I. L. R. 435.

to say the offer of compromise) is a fact to go the jury, yet it ought to have little or no weight at all with them, for the offer may have been made from motives of charity without any admission of liability at all," and of such slight weight did the Court think it that they refused to send the case down to a new trial, because, as Parke, B. stated, "the fact, if it had been submitted to the jury, ought to have been submitted with such strong observations as to make it very improbable that they would find for the plaintiff." This case, therefore, when carefully examined, is an authority in favour of the defendant. It is absolutely plain, in my opinion, that the Court which refused to grant a new trial under the circumstances appearing in that case would, in the present case, have directed a verdict for the defendant Bradlaw.

The case of *Beck* v. *White* (1), which was cited in *Thomas* v. *Morgan* (2), is strongly in favour of the defendant. The plaintiff there had been bitten by a dog of defendant's, and in order to prove scienter, evidence was given that defendant promised to make a *pecuniary satisfaction* to the plaintiff after the latter had been bitten. Lord Ellenborough held the evidence insufficient, and directed a non-suit. That is altogether in favour of the defendant. The offer was to pay "a pecuniary satisfaction," infinitely more than was offered here, yet Lord Ellenborough held the evidence insufficient, and directed a non-suit. This was the opinion of Lord Ellenborough, reported in Campbell's Reports—reports that are always considered reports of much authority, very different from the reports by Carrington and Payne, which Lord Blackburn so emphatically denounced.

As to *Hibbs* v. *Ross* (3), which was cited on behalf of the plaintiff, that was the case of a ship in dock, under the care of a ship-keeper. Now a ship-keeper is a well-recognised officer. The ship-keeper, whilst the ship is in dock as that was, keeps the ship. It is but a natural presumption that the owner of the ship keeps the ship-keeper. The same considerations apply to *Joyce* v. *Capel and Slaughter* (4), the case of the barge, where the natural presumption

(1) 4 Camp. 198.
(2) 2 C. M. & R. 496.
(3) L. R. 1 Q. B. 534.
(4) 8 C. & P. 370.

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was that the owner of the barge appointed the bargeman as his servant. The present is not the case of a regular liveried servant driving a trap. It is not a case where *ex concessis* the person driving is the servant of someone. These cases, therefore, seem to me to be distinguishable from the present, even without referring them, as my brother Barton has done, to principles peculiar to maritime law.

A case much relied upon on behalf of the plaintiff was *Illidge* v. *Goodwin* (1). The point which the reporter thought worthy of a marginal note appears to be that a person who leaves a horse and cart standing in the street without anyone to watch them must take the risks. The case, however, is cited here on account of the statement by Tindal, C.J., as to the effect of an offer to pay money. I have read the case carefully, and I can find nothing to show the precise nature of such offer or the circumstances under which it was made. But let me see what light *Illidge* v. *Goodwin* (1) throws upon the case. Let me see what Tindal, C. J., did say in that case. A question arose as to who was served with the writ, whether Joseph Goodwin, the father, or Joseph Goodwin, the son. It is plain to my mind there was an attempt at a juggle between father and son. So, evidently, thought Tindal, C.J. He is reported to have said, "No one can doubt that the father knew very well all that had been done." After this, Spankie, Serjeant, proposed to call the father, to prove that the cart was his and not his son's. Tindal, C.J. said, and I give his words and ruling in full, and punctuate them as they are punctuated in the report (2). These are the words—"I think, upon the evidence before me, I must take him to be the defendant. There is evidence enough. He offered to pay money. On the facts, there is evidence of practice between the father and the son." Now, these are the words. How are they attempted to be read. They are attempted to be read as if there was no full stop between the words "enough" and "he." They are attempted to be read as if the words were: "There is evidence enough, he offered to pay money." As if the sufficiency was determined by the offer of money, and nothing else, while there was the all-important

(1) 5 C. & P. 190. (2) *Ibid.* 193.

additional sentence: "On the facts there is evidence of practice between the father and son." Mainly and principally upon what Chief Justice Tindal called "the practice between father and son," he held that upon this question of service he should take the father to be the defendant; and it is to be noted that the Chief Justice said: "All this was a matter for setting aside the execution." Before he said anything about an offer of money, he had stated, as I pointed out, that no one could doubt that the father knew very well all that had been done. It would appear to me that the offer of money, whatever it was, was a very minor factor in Chief Justice Tindal's determination. Now, if this case is of any value whatsoever—and I much doubt that it is of any value whatsoever with reference to the matter we are considering—any value, however infinitesimal, that it possesses is on the side of the defendant here, and not on the side of the plaintiff. There was certainly more than an offer of money in the case. It is treated as the *pièce de resistance* of the plaintiff, and to make it available for the plaintiff, punctuation is not merely lost sight of, but the ruling is misread, and the principal sentence in the ruling is wholly disregarded.

Cormack v. *Digby* (1) was pressed upon our attention by Serjeant Dodd for the reasons and observations of the Chief Baron in that case. The marginal note tells us what the case was. "A herd named Conlan got leave from his master to go for the day to a neighbouring town to transact business of his own, and borrowed his master's horse and tax-cart for the purpose. He afterwards proposed, and the master assented, that he should bring home some meal from the town for the master. *Held*, in an action for the negligence of the servant, that the Court would not hold as a matter of law upon the evidence that the master was responsible for the negligence of the servant." The Lord Chief Baron, amongst other relevant matters, said:—"It seems clear that if, prior to the loan of the horse and tax-cart, the relation of master and servant had not subsisted between the defendant and Conlan, the former would not have been liable for the negligent act of the latter."

(1) I. R. 9 C. L. 557.

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In the present case it would appear to me that the relation of master and servant at no time existed between M'Glynn and Bradlaw—certainly it did not exist before the day in question, and I can find no evidence that it existed on the particular day. The case made by the plaintiff's sister was that she heard Bradlaw had lent the pony and trap to M'Glynn.

To summarise, then, my views as to the first question, whether there was evidence proper to be submitted to the jury as against Bradlaw—I think not, because in my opinion *Sayers* v. *Walsh* (1) and *Thomas* v. *Morgan* (2) are authorities in favour of the defendant Bradlaw. The observation made by Baron Pennefather during the argument when he distinguished *Sayers* v. *Walsh* (1) from *Thomas* v. *Morgan* (2) is clearly to be noted. It is plain that *Thomas* v. *Morgan* (2) was relied upon as an authority for the defendant Walsh, but Baron Pennefather said: "That case wants one other ingredient in this case that the defendant said the dog slipped out." This was the additional circumstance relied upon which, in the opinion of the Court, constituted the evidence to go to the jury. *Beck* v. *White* (3) was indeed a very strong decision in favour of the defendant. *Illidge* v. *Goodwin* (4), so far as it goes, is in favour of the defendant Bradlaw, and so also very clearly is the reasoning and observations of the Chief Baron in *Cormack* v. *Digby* (5).

I now turn to the second ground of impeachment of the verdict, namely, that it was against the weight of the evidence, and in the consideration of this ground of impeachment I assume that there was some evidence to go to the jury. In the first place I would like to say something as to the fact of the non-production of the defendant Bradlaw. Sometimes dexterous counsel, when they have no real case to appeal to, by commenting on the absence from the witness-box of some one they allege ought to be produced, succeed in raising a mist of prejudice around the jury-box. Counsel deal with the case as if the maxim *omnia praesumuntur contra spoliatorem* applied, which of course is the merest mistake, because that maxim applies

(1) 12 I. L. R. 435.
(2) 2 C. M. & R. 496.
(3) 4 Camp. 198.
(4) 5 C. & P. 190.
(5) I. R. 9 C. L. 557.

only when the *spoliator* does a wrongful act, and the fact that a person does not appear as a witness is not a wrongful act. No doubt, if some evidence has been given of the existence of a fact necessary to be proved against a defendant, the jury may regard his non-production in coming to a conclusion as to the existence of that fact; but I absolutely and most certainly deny that in this case the jury would be justified in finding against the defendant without some evidence having been produced against him. It is in my opinion a wholly unsustainable proposition, that the matters in controversy in this case were so entirely within the knowledge of the defendant that the *onus* of proving non-liability lay upon him, and that the affirmative did not lie upon the plaintiff. But it is true, as I said, that the jury may regard the fact that the defendant was not produced if some evidence is given against him as to the existence of a particular fact or a particular state of facts. What then was the proposition of fact essential to be established? This—that M'Glynn was on the occasion in question, not only the servant of Bradlaw, but that, as such servant, he was acting within the scope of his duty to Bradlaw. The learned Serjeant may no doubt have thought that even a jury, under the circumstances of the particular case, were incapable of such a *tour de force* as would be involved in the affirmative of that proposition.

What was the matter of fact from which such a proposition of fact could be inferred. Putting aside for a moment the offer of expenses (which, if evidence of liability at all, is admittedly of the most meagre character, and such as Baron Parke would certainly tell a jury to attach no weight to), there was nothing whatever to warrant the finding of such a proposition of fact. The suggestion was that the pony and trap had been lent. This is what the sister "heard," and Bradlaw at no stage denied that the pony and trap were his. But let us see what Purcell, the clerk, said. It appears from his evidence that M'Glynn had two ladies out with him in the trap: one of these was sitting behind with Purcell, who says he himself got a "lift"—the other was in front with M'Glynn, who was driving. It appears M'Glynn has since married this lady. Is it to be said that M'Glynn when driving this lady, whom he very shortly afterwards married, and to

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whom he was no doubt at that time paying his addresses, was the servant of Bradlaw acting within the scope of his authority? M'Glynn was plainly cultivating the society of his lady-love—the lady he afterwards led to the altar, and is it to be contended that when he was so engaged he was in the eye of the law the servant of Bradlaw acting within the scope of his duty towards him. I can find nothing in the lighter moods of even our unauthorized law reports to sanction such a proposition. As I have said I can find no evidence in this case to fix Bradlaw with liability, but were there even some of a meagre *prima facie* character, which I deny, yet it must be remembered that even in the case of the ship-keeper, the case of *Hibbs* v. *Ross* (1), which has been referred to, a new trial was offered by the majority of the Court. I say majority of the Court, for Mr. Justice Mellor thought there was no evidence at all of liability. Lord Blackburn, when giving the judgment of himself and Mr. Justice Lush, said: "I therefore think that the register was evidence from which, when unexplained, the jury might properly draw the inference that the owner employed the persons actually in charge of the ship, but that it was only evidence quite capable of being explained or rebutted, and therefore the defendant may if he so elects within a fortnight have a new trial —costs to abide the event—otherwise I think the rule should be discharged."

I cannot help thinking that the defendant Bradlaw sustained very great prejudice by the statement of M'Glynn that the pony aud trap belonged to Murphy. This statement was false, and was not evidence against Bradlaw. When Bradlaw himself came upon the scene, he admitted the pony and trap were his; but it would appear to me that both Bradlaw and M'Glynn thought that the fact of Bradlaw's having lent the pony to M'Glynn would fix liability upon Bradlaw. Even if I thought there was some evidence against Bradlaw, and I am very clearly of opinion there is no evidence proper to be submitted to a jury against him, still, nevertheless, and notwithstanding he was not produced, I would be, as Lord Blackburn was in *Hibbs* v. *Ross* (1), in favour

(1) L. R. 1 Q B. 534.

of granting a new trial. The finding that M'Glynn was the servant of Bradlaw, acting within the scope of his duty to him, appears to me to be absolutely unsustainable—such a verdict as no twelve men who fairly considered the case could or might reasonably find.

K. B. Div. 1901.

POWELL v. M'GLYNN & BRADLAW.

The Court being equally divided, no rule was made on the motion.

The defendant Bradlaw appealed to the Court of Appeal (FITZ GIBBON, WALKER, and HOLMES, L.JJ.),

Appeal. 1901. April 19, 22.

Serjeant Dodd, K.C., and *Jefferson*, for the appellant.

Redmond Barry, K.C., and *Herbert Wilson*, for the respondent.

FITZ GIBBON, L.J. :—

April 22.

We all agree as to this case. When we have ascertained how it should be regarded in point of law, it resolves itself into the question of fact, whether there was evidence on which the jury could reasonably find as they did. It is not immaterial to see how the plaintiff presented his case in pleading. The two defendants are sued as joint wrong-doers, not as master and servant. The writ bears this endorsement :—"The plaintiff's claim is for damages for injury to the plaintiff by the negligence of the defendants and their or his servants when in charge of a horse and trap." To make this grammatical, it must be read as "negligence of the defendants, *or of one of them*, and of the servants of them or of one of them." The cause of action is more fully stated in the statement of claim, but still to the same effect :—"The plaintiff has suffered damage from personal injuries caused by the defendants or their servants on December 24, 1899, negligently driving a horse and trap ; or by the negligence of the defendants or their servants when in charge of the said horse and trap." The plaintiff's pleadings do not suggest that either defendant was the servant of the other, but treat the defendants, jointly and severally,

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Fitz Gibbon, L. J.

as wrong-doers, acting personally or through their servants. The defendants severed their defences. Bradlaw pleaded, in addition to traverses, that the damage, if any, arose from inevitable accident, contributory negligence, or the plaintiff's own negligence: and that the horse and trap were not under his control or management at the time of the accident, nor were they driven or managed by his servant. Nothing was done by the plaintiff to obtain information, by way of discovery, from the defendants, but Bradlaw asked for particulars, inquiring the name of the servant or servants through whose negligence it was alleged that the plaintiff was injured. The only answer he got was that this information was within the defendants' knowledge, and was not within the plaintiff's knowledge. Thus it appears that the action was brought to trial by the plaintiff, not knowing who was in charge of the horse and trap, but without any indication of intention to charge either of the defendants on the ground that the other was his servant. However, I take the pleadings as sufficient to raise the point which was ultimately tried, viz. that M'Glynn was the servant of Bradlaw, and that the accident happened through M'Glynn's negligence, acting within the scope of his authority as Bradlaw's servant. Still the way in which this question was raised may account for Bradlaw's not being there to meet it, as he might have been if it had been more directly raised. M'Glynn is plainly liable. The only question which we have to consider is whether there is evidence to charge Bradlaw also, upon the relation of master and servant between him and his co-defendant. There is now no attempt to establish any joint liability; the only question is whether Bradlaw has been proved, on sufficient evidence, to be responsible *as master* for the negligence of his co-defendant, M'Glynn, who is personally and primarily answerable for his own misfeasance. Two matters only appear in evidence tending to prove that M'Glynn stood in the relation of servant to Bradlaw, or that his negligence was committed as Bradlaw's servant and within the scope of his authority as such, viz.—First, the fact that the pony and trap were Bradlaw's property; secondly, the conversation between the plaintiff's daughter and Bradlaw.

No doubt, ownership of the thing which does the mischief often supplies *prima facie* evidence sufficient to make the owner

responsible for the damage. If we refer, for example, to the barge and omnibus cases, the person in charge was manifestly acting as the servant of someone, and presumably of the owner. In such cases it is more frequently a question of the identity of the master, than of the existence of the relation of master and servant between the negligent person and somebody else. Here a runaway pony did the mischief: the pony belonged to Bradlaw; the use of the pony and trap had been given by Bradlaw to M'Glynn; and the injury occurred while M'Glynn was in charge. But nothing further was *proved*. Everything else which has been *urged* against Bradlaw (apart from the conversation with him), is only matter of inference or of speculation. If anyone is to suffer from deficiency of evidence, or from reticence and hesitation at the trial, it must be the party on whom the burden of proof lay. It is not satisfactory to have to decide upon rights and liabilities, where neither party has chosen to ask the vital question on which the issue turns. I am sorry that somebody, counsel, juror, or even judge, did not ask the witness Purcell a good deal more than he was asked. He must have known where the trap had gone; on what business, and on whose business, it had been engaged; and how the people driving in it had been employed during the day. But the *only* evidence we have on this part of the case is given by Purcell; and all he says about it is, that the pony and trap were brought round and given by Bradlaw to M'Glynn early in the day. There is nothing in this to show what was the relation existing between the two men; far less is there anything to prove what was essential to the plaintiff's case, viz., that M'Glynn in driving the trap was the servant of Bradlaw. It rested on the plaintiff to give affirmative evidence of this in the first instance, and having failed to do so, he cannot help himself because the truth (whatever it was) was not elicited from Purcell by someone else. The next and only other fact proved, after the delivery of the horse and trap by Bradlaw to M'Glynn, is that in the evening M'Glynn was in Longwood Avenue, left the trap, went up to the door of a house, and was bidding good-bye to two ladies, when something startled the pony and it ran away. Bidding good-bye to two ladies was *prima facie* not the business of Bradlaw, and where is

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the evidence that M'Glynn went to Longwood Avenue in the scope of his employment as Bradlaw's servant?

There is nothing to suggest that M'Glynn was usually, or indeed ever before, employed by Bradlaw about the pony or trap, nor to show that M'Glynn was ever seen with it before. There is no reference in the evidence to the race meeting on the day of the accident which Mr. Redmond Barry has stated took place, and no evidence whatever that any business of Bradlaw's was transacted there, by the occupants of the trap or by any one. Even if M'Glynn had been Bradlaw's coachman, I do not see that in getting out of the trap and going to bid good-bye to two ladies, at the end of a drive on a holiday, in his master's absence, there would have been any presumption that he was acting as a servant within the scope of his employment. Still less can there be any such presumption in the case of a gentleman who was in no real sense a servant. So far, the case comes clearly to my mind within the rule that where there are two *hypotheses*, one involving and the other not involving the liability of a defendant, each equally consistent with the evidence, the plaintiff cannot get a verdict, and the defendant is entitled to a non-suit. But here I think that there is a preponderance of probability, if we may speculate, in favour of the relation of "lender and borrower," as against that of "master and servant."

As to the attempt to rest the verdict on Bradlaw's conversation with the plaintiff's daughter, we must remember that, to avail the plaintiff, it must amount to an *admission*, and to maintain the verdict, it must be an admission of *liability*, or of fact from which liability is to be inferred. In my opinion, what Bradlaw is proved to have said in no sense amounts to this. The evidence is given by the lady in two distinct parts; he asked how the accident happened; she said, "we do not know, and would like to know." He said that if she liked to do so, she could take her father home from hospital, and he would pay all expenses. This reminds me of the comment which I once heard Dowse, B., make on similar evidence, "You might as well give the oil and the twopence in evidence against the good Samaritan to prove that it was he who robbed the man!" She also said that before this offer she had said, "I believe you lent M'Glynn your trap," and that the only reply he made to

that remark was an ejaculation which was made the subject of an interesting etymological discussion in the King's Bench Division, but which certainly was not an admission, and was not even articulate. If he had lent the pony he would not be liable. I take the liberty of saying that, in my opinion, Barton, J., has well said that it is contrary to good faith and to public policy to allow an offer made on the basis of one state of facts to be treated as an admission of and as evidence of an opposite proposition. Bradlaw did not offer to pay money on the basis of liability; he said he was *sorry* for the accident, and he offered to pay *expenses*: that was not an offer of *compensation*, it was evidence of the sincerity of his natural regret that an injury had been suffered through his pony having run away. No jury could reasonably act upon that as an admission of legal liability, and it appears to me to supply no evidence whatsoever that M'Glynn, in letting the pony run away, was Bradlaw's servant acting within the scope of his employment, and nothing short of affirmative evidence of this proposition can sustain the verdict. Considering the case both upon the evidence and upon the probabilities, it seems to me to be far more unlikely that M'Glynn was in any sense Bradlaw's servant, or that Bradlaw was legally or morally liable, than that Bradlaw lent the pony and trap to M'Glynn to take the ladies and Purcell out for a drive on their own business or pleasure. The case was left in this position by the plaintiff: there were two possible alternatives, and one of these, not the least probable, left M'Glynn alone answerable; therefore Bradlaw was entitled to a non-suit or a direction in his favour; and he must now have judgment with costs here and in the Court below.

WALKER, L.J.:—

I think the judgment of the Lord Chief Justice contains an accurate summary of the facts and law, and I am content to rest my judgment upon it.

It is admitted that the trap belonged to Bradlaw. It is admitted that M'Glynn, who drove it, was not in the garb of a servant or coachman, and therefore there was nothing in his appearance to suggest his being in the employment of anyone. It is admitted that if the plaintiff did not prove more than that the

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trap was lent by Bradlaw to M'Glynn, or left the case as presented by him consistent with that condition of things, there was no case to go to the jury to warrant a finding that M'Glynn was acting as the servant of Bradlaw within the scope of his authority. I quite agree, however, that Gibson, J., did right in leaving this question to the jury for the purpose of having litigation finally determined.

The only case suggested against Bradlaw is his own alleged admission of liability, as detailed in the evidence of Miss Powell, a liability hinging, and hinging only, on the fact of M'Glynn being imported into the position of servant acting within the scope of his authority. It is both law and justice that the whole of an admission, and the facts out of which it arose, must be considered before it can be used against the person who makes it.

There was much that occurred in the case to make a jury hostile—the fact of injury, the fact that the pony and trap belonged to Bradlaw, and the nonproduction of witnesses, were all calculated to create an unfavourable impression; but that does not relieve the plaintiff in an action of negligence from the burden of proving a *prima facie* case, or shift the burden of proof on the defendant. If he leaves the case consistent with the presence or absence of liability, "*melior est conditio possidentis*," and the defendant is entitled to a direction. Such is the considered judgment of the House of Lords in an action of negligence (1).

The whole case turns upon the evidence of Miss Powell. Bradlaw went to plaintiff's house, I think, under the impression that the ownership of the pony created a moral liability, or at all events prepared to pay all expenses caused by his pony and trap. It is not suggested that in point of law ownership imposed liability.

This is not the simple case of Bradlaw coming to Miss Powell and saying, "I am very sorry my pony and trap were the cause of the accident, and I am willing to pay for the results." Take the evidence with the cross-examination interpolated in its proper order:—

Bradlaw says—"How did it happen"? Miss Powell—"We do not know and would like to know. I believe you lent your pony and trap." Bradlaw—"Humph!" (This is defined in the

(1) *Wakelin* v. *Lond. & S.-W. Ry. Co.*, 12 App. Cas. 41.

Century Dictionary as "*a grunt of dissatisfaction.*") "I am very sorry it was my pony and trap. If you like to do so, take your father home and I will pay all expenses."

I think both may have been proceeding on the notion that ownership involved liability, and that would not help the plaintiff. We cannot divorce the defendant's offer from what it sprung from. He in the first instance connected it with the ownership of the pony and trap, which were sufficient to suggest kindly action but not liability, and Miss Powell follows up that by suggesting he lent them, which intensified the motive for acting kindly, but established legal immunity. The offer sprung from a cause in both minds which creates legal immunity, and is certainly consistent with it.

I do not say what the result would be if he merely came and said, "I'll settle and pay all expenses." This is really the basis on which Judge Madden deals with the case, while he rightly states that ownership does not create liability, and differentiates the case of the bargeman who appears on a barge acting as bargeman. In the cases cited the statement of defendant and his offer to settle were in connexion with statements and facts which involved liability. In *Sayers* v. *Walsh* (1) the statement involved that he knew his was a dog which should have been kept confined; and in *Thomas* v. *Morgan* (2), "I'll settle, if you prove my dogs did it," involves that the dogs were animals for whose acts he would be responsible. But the evidence was not deemed sufficient to save the non-suit, and the word used was "settle."

Here the offer is coupled with the assumption of a loan prior to which the relationship of master and servant did not in fact exist, and from which without more it cannot be inferred. It is not even a lending to a third person, and M'Glynn driving, but one on which the person to whom the loan is made is sought to be made driver for the lender and acting within the lender's authority. The facts certainly raise no presumption that M'Glynn was Bradlaw's driver, and rather negative it.

As to the "Humph," it appears to me to intensify the idea of liability arising from ownership alone, as if he had said, "It is quite true, and a great fool I was to lend it to him, who was

(1) 12 Ir. L. R. 434. (2) 2 C. M. & R. 496.

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amusing himself with two ladies when he ought to be minding his horse."

The maritime cases are altogether distinguished by the circumstance that here we are dealing with an alleged driver, who must be imported into that position by evidence not germane to his position or calling.

I think the theory of M'Glynn being Bradlaw's driver is inconsistent with the evidence offered to support it, and at all events the evidence is equally consistent with immunity.

There is no presumption that M'Glynn was acting as the actual servant of or on the business of Bradlaw. The facts, so far as proved, go to rebut that in my mind.

They are more consistent with Bradlaw lending his pony and trap for this pleasure expedition of M'Glynn, with which Bradlaw had no connexion.

HOLMES, L.J. :—

This case comes before the Court in an unsatisfactory manner, for which one side is as responsible as the other.

The plaintiff and the defendants seem to have vied with each other in withholding from the jury all material information. I don't refer to the non-production of particular witnesses, for which perhaps there may have been good reason. But when Mr. Purcell was in the box everything of importance could have been obtained from him if he had been fully examined. He could have told the relations existing between the two defendants, and where M'Glynn had driven, and on what business he was engaged, on the day of the accident. It is much to be regretted that he was allowed to leave without having been questioned by some one on these points, as his evidence might have put an end to the litigation, or if not would have enabled the Court to decide with a full knowledge of the facts. When the plaintiff's case closed, the only matters in his favour that had been proved were that he had been injured by a runaway and apparently derelict horse and trap belonging to Bradlaw, who had expressed to the plaintiff's daughter regret for the accident, and had told her that if she brought her father home from hospital he would pay the expenses of his illness.

Now, if nothing more had been known of the transaction, it is possible that the foregoing facts might have afforded some evidence of Bradlaw's liability, although I confess I would have great hesitation in allowing a jury to act on it. But it further appeared in the course of the plaintiff's case that Bradlaw was not in charge of the horse and trap on the occasion of the accident, that M'Glynn was driving Purcell and two lady friends in it, and that it was through his carelessness the horse took fright. It therefore appeared to the Judge that Bradlaw's liability depended upon whether M'Glynn was his servant, acting within the scope of his authority, or otherwise carrying out his orders; and this was the question submitted to the jury. There was not, however, a scintilla of evidence to establish it. The only light thrown on it during the plaintiff's case was Miss Powell's statement, that she believed Bradlaw had lent the horse and trap to M'Glynn—a statement inconsistent with the relation of master and servant existing between them.

The only inference to be drawn from Purcell's evidence, meagre as it was, is that M'Glynn was not, at least in the ordinary sense of the word, Bradlaw's servant, and that he was using the horse and trap for his own amusement or conveyance at the time the accident occurred. No doubt the jury were at liberty not to accept his testimony; but their rejection of it has not the effect of substituting for it evidence of a contrary or different character.

If the verdict and judgment were allowed to stand, we should be making the defendant liable, not only upon a conjectural relationship, but upon a relationship that is inconsistent with all that was proved at the trial.

Solicitor for the plaintiff: *P. A. Chance.*
Solicitor for Bradlaw: *T. A. Furlong.*

G. Y. D.

Q. B. Div. 1900.

GROGAN *v.* REGAN (1).

Nov. 12, 20. *Appeal.* Dec. 17. 1901. Feb. 8.

Statute of Limitations — Landlord and tenant — Rent — Lessor, lessee, and sub-tenant — Payment of head rent voluntarily by sub-tenant — Non-payment of rent to immediate landlord for nineteen years by sub-tenant — 23 & 24 Vict. c. 154, s. 21.

In the year 1881 the plaintiff became entitled under a will to the rent of £10 reserved by a yearly tenancy, but never received any payment of the said rent. The yearly tenant, since the year 1881, had paid no rent to his immediate landlord in respect of the premises held by him under the yearly tenancy, but he had, since the year 1890, paid one moiety of the head rent reserved by an old lease, and payable by his immediate landlord in respect of the premises. These payments in respect of the head rent were made voluntarily. In the year 1900 the plaintiff sued the defendant for rent under the yearly tenancy:—

Held (reversing the decision of the Queen's Bench Division), that the rent was statute barred, and was not kept alive by the payments made in respect of the head rent.

CASE STATED upon the hearing of a civil bill appeal before Murphy, J. The case stated was as follows:—

"The defendant appealed against a decree of the County Court Judge for £5 for rent of premises in Ballyhaunis, County Mayo. It is proved or admitted that the premises were held with others under a lease for a long term of years at a rent of £3. The predecessors of the defendant had been yearly tenants to the predecessors of the plaintiff at a rent of £10 a-year under a parol contract of tenancy. The defendant is the widow of one Michael Regan, who died in 1898: the premises were assigned to him by his father, Thomas Regan, on the occasion of his marriage, by assignment, a copy of which is set out in the schedule.

"The plaintiff was born in 1887, and was a son of Thomas Grogan, who died in 1872, leaving the plaintiff and two other children surviving him and still alive. The said Thomas Grogan

(1) Before MADDEN, BOYD, and BARTON, JJ.

was son of Michael Grogan, the lessee. The plaintiff claimed under his grandfather's will, a copy of which, with the letters of administration, is set out in the schedule. His right, if any, accrued in 1881, and it was admitted he had never received any rent out of the defendant's premises, but it was proved that rent had been paid to his grandmother, Mary Grogan, up to her death in 1881, and it was admitted that Michael Regan and the defendant successively, when in possession, had for ten years, namely, from 1890 onward, paid half the head rent of £3 to the head landlord, the other half being paid by John Biesty, who was in occupation, rent free, of the rest of the premises comprised in the lease. The receipts for head rent were given in the name of 'representatives of Michael Grogan,' who was the original lessee. A copy of one of the receipts is set out in the schedule.

"For the defendant it was contended that the plaintiff was not entitled to recover, and that his right (if any) was statute barred.

"For the plaintiff the payment of the head rent was relied on as taking the case out of the Statute of Limitations.

"I was of opinion that the plaintiff was not entitled to recover, but at the request of his counsel I agreed to state this case for the opinion of the Court."

A schedule containing the documents above mentioned was appended, but it is not necessary to set the documents out for the purposes of this report.

Powell and *Taylor, Q.C.*, for the plaintiff.

G. O'Connor and *Fetherstonhaugh, Q.C.*, for the defendant.

Cur. adv. vult.

Nov. 20.

The judgment of the Court was delivered by—

MADDEN, J.:—

This case raises a question which was suggested in *Ahearne* v. *M'Sweiney* (1), but which does not appear to have been as yet decided:—the effect, as between sub-lessee and his immediate

(1) I. R. 8 C. L. 568.

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lessor, of the payment of head rent, voluntarily made under the 21st section of the Landlord and Tenant Consolidation Act of 1860. I say *voluntarily*, for there is no evidence of compulsion in the present case.

Before this Act was passed it was well settled that such a payment made by a sub-lessee under compulsion on the part of the head landlord must be taken as made by the sub-lessee on behalf of his immediate landlord. Referring to the authorities by which this principle was established, O'Brien, J., said:—"Upon referring to those cases it will be seen that in all of them the head landlord had either distrained, or threatened to distrain, the under-tenant, or had demanded the head rent from him; and, according to the judgment of Baron Rolfe in *Graham* v. *Alsopp* (1), the general principle to be deduced from those cases is, that if a tenant be compelled by the head landlord to pay the head rent, he may treat such payment as made in discharge of the rent due by him to his immediate landlord (2)." Under such circumstances it was held that the under-tenant could maintain an action to recover the amount from his immediate landlord, as money paid to his use, and at his request.

But where the payment of head rent was voluntarily made, the principle of these cases did not apply; and, in the judgment from which I have quoted, O'Brien, J., observed that no authority had been cited as deciding that a payment made otherwise than under compulsion gave the under-tenant any present right of action against his immediate landlord. Although there is no decision on the point, there is high authority for the proposition that even a voluntary payment of head rent by a sub-lessee will be presumed, in the absence of evidence to the contrary, to have been made by arrangement with the intermediate landlord. We have been referred to two cases in which this question was suggested. The earlier of those, *Drew* v. *Norbury* (3), is a well-known authority on another branch of the law. The question upon the Statute of Limitations was not discussed on the re-argument before Sir Edward Sugden, C., Blackburne, C.J., and Pennefather, B., the argument being confined to the construction

(1) 4 T. R. 511. (2) L. R. 8 C. L. p. 574. (3) 3 Jones & Lat. 267.

of the Registry Acts. However, Mr. Fetherstonhaugh is entitled to say that Sir E. Sugden indicated an impression in his favour. The later case was heard by Blackburne, when Lord Chancellor, and in his judgment he states with great clearness the opinion which he seems to have held in *Drew* v. *Lord Norbury* (1). It is true that the question in *Hayes* v. *Woodley* (2) turned on non-payment of rent reserved by a lease, the mere retention of which would afford no ground for the bar of the Statute of Limitations (*Grant* v. *Ellis* (3)). But although the case was decided under the 9th section of the statute, the following observations of Blackburne, C. (at p. 150), are of general application :—"Does the sub-tenant, he asks, in fact retain his rent? No, he pays the head rent. For whom, and on whose account, does he do so? Plainly, for, and on account of, his own landlords, the intermediate reversioners, whose right he, by deed in 1822" [the period from which it was alleged that the statute ran] "expressly recognised, and between whom and himself as assignee of the lease of 1723, there was complete privity of estate; so that these acts, these very payments, were made on behalf and in discharge of the legal obligations, and to preserve the estates of the very persons to whom he contends his possession was adverse. I observe that the receipts taken from Lord Gort" [the head landlord] "are not produced: if they were I doubt not they would be, as they ought, receipts to the representatives of the lessee in the lease of 1706. Now if we regard the consequences of this doctrine, contended for by the defendant, I need not say how alarming it is in a country where sub-tenancies are so general; but I have no idea that an occupying tenant, liable to pay a rent service, can be allowed to avail himself of the Statute of Limitations because he has only paid so much of his rent as keeps down the head rent."

In this state of the law, and eight years after this clear exposition of the policy upon which it ought to be founded, the Act of 1860 was passed. The 20th section enables the head landlord to apply compulsion by noticing the sub-tenant to pay the head rent to him, in the event of default by his immediate tenant, providing that the receipt of the landlord is to be a full

(1) 3 Jones & Lat. 267. (2) 3 Ir. Ch. R. 142. (3) 9 M. & W. 113.

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Madden, J.

discharge to the sub-tenant against the tenant in respect of all not so paid. The 21st section—a new enactment—enables the sub-tenant, in the event of such default, "before any action brought by such tenant against the sub-tenant, voluntarily to make payment of so much of the rent due by such sub-tenant to such tenant, as may be sufficient to discharge such gale or gales; and the receipt of the landlord or his agent shall be a full discharge to the sub-tenant against the tenant in respect of all rent so paid."

In my opinion the effect of the 21st section is to place a voluntary payment of head rent by a sub-tenant in the same position as a payment under compulsion, and thus to give effect to the policy approved by Blackburne, C., in his judgment in *Hayes* v. *Woodley* (1). This it does by enacting that the payment of head rent is to have the same effect, as between the sub-tenant and his immediate landlord, as the payment of so much of the rent. If this portion of the rent had been in fact paid, no question could arise under the Statute of Limitations, and the statutory effect between the parties seems to me to be the same.

This view of the section is quite consistent and in accord with the decision in *Ahearne* v. *M'Swiney* (2), already referred to. The payment in that case was made after action brought by the intermediate landlord, and therefore did not come within the 21st section. The case was decided on this ground; but FitzGerald, J. (at p. 576), suggested as a proposition that it might come to be determined, "that the tenant who is authorised to pay the head rent to the head landlord, and to deduct it when paying his rent to his immediate landlord, may bring an action for its recovery if the deduction is refused."

We have been referred to the authorities which have established the right of the sub-tenant to a salvage claim on the interest of his lessor: *Locke* v. *Evans* (3) and *O'Geran* v. *M'Sweeney* (4).

These cases, however, rest upon an equitable doctrine, which may be independent of request, the foundation of its application being the preservation of property by means of an advance made by a person interested in preserving it. It has been applied in

(1) 3 Ir. Ch. R. 140.
(2) I. R. 8 C. L. 568.
(3) 11 Ir. Eq. R. 52.
(4) I. R. 8 Eq. 500.

cases in which an action would not lie at the suit of the salvagor for money paid to the use and at the request of the person against whom the lien was enforced, as in *Shearman* v. *British Empire Assurance Co.* (1). I do not think that we derive much assistance from this class of cases.

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My brother Boyd, who is engaged elsewhere, authorises me to state, that he is of the same opinion for the reasons which I have stated.

BARTON, J., concurred.

A. E. R. J.

Appeal. 1900. Dec. 17. 1901. Feb. 8.

The defendant appealed to the Court of Appeal (Lord Ashbourne, C., FitzGibbon, Walker, and Holmes, L.JJ.).

Fetherstonhaugh, Q.C., and *Powell*, for the appellant.

Taylor, Q.C., and *G. O'Connor*, for the respondent.

Cur. adv. vult.

Feb. 8.

FITZ GIBBON, L.J. :—

The Lord Chancellor is unable to be present. Lord Justice Walker and Lord Justice Holmes have written out judgments which the Lord Chancellor and I have seen, and in which we concur.

WALKER, L.J. :—

This is an action for rent upon a parol tenancy claimed to be issuing out of certain premises in the town of Ballyhaunis. Those premises formed part of the estate of the Taaffe family, and were demised to the Grogans under a lease for a long term of years at a rent of £3. The defendant or her predecessor in title had been sub-tenant to the Grogans under a parol tenancy at a rent of £10. The plaintiff's title to the mesne lease accrued in 1881, and it was admitted that he had never received any portion of the rent

(1) L. R. 14 Eq. 4.

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reserved under the sub-tenancy, and his title therefore *prima facie* was barred after the expiration of twelve years from 1881. It was contended, however, that the operation of the Statute of Limitations was prevented by the fact that the head rent of £3 had been paid as to one-half by the defendant, and as to the other half by John Biesty, who was in occupation rent free of part of the premises.

Receipts for the head rent were given by the head landlord in the name of the representatives of his lessee. It is not suggested and it cannot be inferred that the head rent was paid under any arrangement in fact, made between the mesne lessee and the sub-tenant, that the payment of head rent should go against or be attributed to rent payable by the sub-tenants as between them and the mesne lessee. The argument was that the head rent must be taken in point of law to have been paid on account of the mesne tenant and as part of the entire rent payable by him to his immediate landlord, and therefore by inference of law received by the mesne lessee as a part payment.

The question depends on the construction of the 8th section of the 3 & 4 Wm. 4, c. 27 (substituting therein twelve years for twenty), and the effect of the rights conferred on a sub-tenant making a payment of head rent by section 21 of the Act of 1860.

It had been established from early times that if a sub-tenant under compulsion paid to a head landlord or other person having a paramount claim a sufficient portion of the rent payable by him in discharge of such paramount claim, this was presumed to be done under an authority conferred by the immediate landlord under the contract contained in the sub-demise: *Jones* v. *Morris* (1); and a request to make such payment was implied.

The 21st section of the Act, 1860, extends the law in favour of a sub-tenant, and enables him before he is sued for his rent by his immediate landlord voluntarily to make payment of a sufficient part of his rent due in discharge of head rent, and the section says that "the receipt of the landlord and his agent shall be a full discharge to the sub-tenant against the tenant in respect of all

(1) 3 Exch. 747.

rent so paid." In this case the payments of head rent were voluntary payments within the meaning of the 21st section. The Court of Queen's Bench in *Ahearne* v. *M'Swiney* (1) was of opinion that the 21st section only confers upon the sub-tenant a right to deduct the payments from his own rent when paying it, and not a right to bring an action for its recovery. That seems to me to be correct, though I do not think the question material as to the application of the Statute of Limitations whether he can sue the immediate landlord or not. The reasoning of Madden, J., in the Court below seemed to be this:—The 21st section of the Act of 1860 puts a sub-tenant who makes a voluntary payment of head rent in the same position as one who made a like payment under compulsion before; and he says the general law as between head landlord, and mesne landlord, and sub-tenant is, as stated by Lord Chancellor Blackburne in *Hayes* v. *Woodley* (2), and therefore the payments here must be attributed to an intention to preserve the mesne landlord and prevent the application of the statute. There is no doubt that Lord Chancellor Blackburne expresses that opinion, and says the payment by the sub-tenant must be taken to be on account of the immediate landlord, and a part payment of his own rent, so that he could not avail himself of the statute. The observations of the Lord Chancellor were a mere *dictum*, as the case before him was in fact ruled by *Grant* v. *Ellis* (3), and they were directed to the effect of the 9th section of the 3 & 4 Wm. 4, c. 27, not sect. 8. If correct to the full extent they would probably also furnish an argument applicable to the 8th section, notwithstanding the difference in language in the two sections. The *dictum* of Lord Chancellor Blackburne has been accepted by the Vice-Chancellor in the case of *Twiss* v. *Noblett* (4). On the other hand, in the case of *Drew* v. *Earl of Norbury* (5), Lord St. Leonards deals with the question as one of fact for a jury, but he did not decide the case upon the Statute of Limitations, and in *Doe* d. *Newman* v. *Godsill*, reported in note to *Doe* d. *Spencer* v. *Beckett* (6), a case upon the 9th section, the Court treated the payment as raising a question for a jury. The language of the

(1) I. R. 8 C. L. 568.
(2) 3 Ir. Ch. R. 143.
(3) 9 M. & W. 113.
(4) I. R. 4 Eq. 64.
(5) 3 Jon. & L. 267.
(6) 4 Q. B. 603, n.

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8th section is very precise, that the right to recover the "rent shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received which shall last happen."

The plaintiff's contention is that all along on the facts rent in respect of the sub-tenant's tenancy was being received by him.

I do not say that when an arrangement with the mesne lessee for payment of the head rent can be found or inferred such a payment may not prevent the operation of the 8th section, but no such arrangement can be found or inferred here: I think the facts negative it. In my opinion the question is one of fact not of necessary legal inference. If I put the question as to whether the sub-tenant by making the payment admitted a liability to his own rent (and such an admission it is which saves the bar of the statute), I would answer that the last thing which occurred to the mind of either the defendant or Biesty was to admit a liability to the rent under the sub-tenancy by merely preserving their own interests.

The principle of the decision in *Harlock* v. *Ashberry* (1) applies, I think, here. The question there was whether a mortgagor had made a payment of principal or interest by reason of a payment of rent by the hands of a tenant of the mortgagor on whom the mortgagee had served notice requiring payment of the rent to him. It was held that this was not a payment of principal or interest made by the mortgagor. It was not made by a person liable to pay principal or interest nor received by the mortgagee in that form. The position of the person paying and the person receiving negatived that idea; so here, in the absence of some arrangement, I think there is no presumption arising from the payment which can make it paid in respect of the tenancy of the sub-tenant under the mesne landlord, or received by the mesne landlord as rent within the meaning of the 8th section.

I therefore think the question should be answered in favour of the defendant.

(1) 19 Ch. D. 539.

HOLMES, L.J. :—

It appears that Michael Regan, who died in 1898, leaving the defendant, his widow, him surviving, was tenant from year to year, without any lease in writing, of certain premises in Ballyhaunis, at the annual rent of £10, which was duly paid by him to Michael Grogan, and afterwards to Mary Grogan, the grandfather and grandmother of the plaintiff, down to the year 1881. Mary Grogan then died, and the plaintiff became entitled under Michael Grogan's will to the premises, subject to the yearly tenancy, but he never received the yearly rent or any part of it, nor does he appear to have applied therefor, until he brought the Civil Bill now before the Court. He has only one answer to the defence of the Statute of Limitations.

Michael Grogan held these premises, with others, under a lease for a long term of years at the annual rent of £3; and Michael Regan paid one moiety of this rent to the head landlord from the year 1890 to the time of his death in 1898, since which it has been paid by the defendant, the other moiety having been paid during the period aforesaid by John Biesty, who was in occupation of the rest of the premises included in the lease. No explanation is given of how the head rent came to be thus paid; but it must, I think, be assumed that it was not through the intervention of the plaintiff. The head landlord, being aware that he was entitled to receive it, probably applied to the persons in possession, who paid it for their own protection; but as far as the plaintiff was concerned, his obligation, as well as his right, was unknown to or ignored by everyone including himself.

The question thus raised must be settled by reference to the 8th section of the 3 & 4 Wm. 4, c. 27, without much assistance from authority: "When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing"—these words correctly describe the position of the defendant's deceased husband—"the right of the person entitled subject thereto"—that is in this case the plaintiff—"to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination

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of the first of such years, or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received."

Has any rent payable in respect of the yearly tenancy been received since the year 1881? It is difficult to see that there has been. The plaintiff, to whom the rent ought to have been paid, has received nothing. The head landlord has not received rent payable in respect of the tenancy from year to year. He has received rent payable under a wholly different tenancy.

The plaintiff relies on the 21st section of Deasy's Act, which authorises a sub-tenant voluntarily to make payment to the head landlord of so much of the rent due by him to his immediate landlord as may be sufficient to discharge any gale of rent due by the latter to the former, and which makes the receipt of the head landlord therefor a full discharge to the sub-tenant. This provision was passed for the benefit and convenience of the sub-lessee and the head landlord, and was not intended to have any bearing upon the operation of the Statute of Limitations, or to affect rights dependent thereon. I am unable to hold that the result of having recourse to the operation thereby contemplated would be to constitute the middleman the receiver of a sum of money paid to a third party behind his back, without his knowledge or privity, and, perhaps, even contrary to his desire. If it were not for the observations of Blackburne, C., in *Hayes* v. *Woodley* (1), I should have but little hesitation in disposing of the case. The Divisional Court was naturally much influenced by the opinion of such an eminent Judge; but it must not be overlooked that *Hayes* v. *Woodley* (1) was itself decided on other grounds, and under a different section of the Statute of Limitations; and for my own part I do not agree with Mr. Blackburne that there is any duty on the part of a sub-lessee to protect the interest of his landlord. The policy and object of all Statutes of Limitation are to induce vigilance in the assertion of legal rights by extinguishing them altogether if they are not enforced within a certain time. The plaintiff has slept upon his rights for seven years longer than the statutory period; and it would

(1) 3 Ir. Ch. R. 143.

seem to me contrary to both the spirit and letter of the statute if he were permitted to rely upon a payment to a third party rendered necessary by his own default as the means of preventing its operation.

Solicitor for the plaintiff: *A. B. Kelly.*
Solicitor for the defendant: *Malachy Kelly.*

G. Y. D.

FITZ GERALD *v.* CLANCY (1).

Appeal. 1901. Feb. 6, 7.

Libel—Injunction—Candidate for election in county borough—Rival candidate—Disqualification—Composition with creditors—Notice served on electors.

The defendant, a candidate for election in a county borough, published a circular, which he gave to the electors, stating that the plaintiff, a rival candidate, was disqualified on the ground that he had made an arrangement with his creditors within five years. The plaintiff issued a writ for libel and an injunction, and upon the same day obtained an interlocutory injunction. It appeared that the plaintiff had, in 1899, executed a deed of arrangement with his creditors, which had not been registered, but that he had subsequently settled with his creditors, who had given to him receipts in full. The defendant moved to dissolve the injunction and to remit the action to the Recorder's Court. The Queen's Bench Division (Johnson and Boyd, JJ.), refused both motions. On appeal:—

Held, that the injunction should be dissolved, but that the motion to remit should be refused.

APPEAL from an order of the King's Bench Division, dated the 26th January, 1901, refusing to dissolve an interlocutory injunction granted *ex parte* on the 14th January, and also refusing a motion to remit. The action was brought to recover damages for libel, and for an injunction.

The plaintiff and defendant were both candidates for the office of Councillor for the South Dock Ward, Dublin, the election for which was to be held on the 15th January, 1901. On the

(1) Before FITZGIBBON, WALKER and HOLMES, L.JJ.

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10th January, 1901, the defendant issued the following circular to the electors:—"Election of Councillor, South Dock Ward, Dublin, 1901. Notice of disqualification of a candidate. To the electors of the South Dock Ward of the County Borough of Dublin. Whereas Thomas J. FitzGerald, of 173, Great Brunswick-street, Dublin, a candidate at the present election for Councillor for the South Dock Ward, made a composition with his creditors within the past five years. And whereas the said Thomas J. FitzGerald is consequently incapacitated and disqualified from being elected as a Councillor for the said County Borough of Dublin. Now take notice that votes given for the said Thomas J. FitzGerald at the present election will be thrown away, and wholly null and void. Dated this 10th January, 1901—John Clancy, a candidate at the present election for Councillor of the South Dock Ward, County Borough of Dublin, and the sitting Councillor of the said ward for the past fifteen years."

The writ was issued on the 14th January, 1901, and on the same day the plaintiff obtained from the Queen's Bench (consist-of Palles, C.B., Boyd and Barton, JJ.) the following order:—"The plaintiff undertaking to abide by any order the Court or a Judge may make as to damages, in case the Court or a Judge shall hereafter be of opinion that the defendant, John Clancy, shall have sustained damages by reason of this order which the plaintiff ought to pay—It is ordered that the defendant be restrained "from printing, publishing, circulating, posting, or in any wise making public any document as to the financial position, *status*, or character of plaintiff, as to the incapacity or disqualification of the plaintiff from being elected as a Councillor for the County Borough of Dublin." The application was grounded on an affidavit of the plaintiff in which he stated that the circular was false and misleading; that in December, 1899, he executed a deed of arrangement with his creditors, nine in number, whose debts amounted to £123 9*s.* 8*d.*, paying them 5*s.* in the £1; that this deed was not stamped or registered under the Deeds of Arrangement Act, as he intended to pay the creditors subsequently in full; that since then he had paid the creditors the balance due to them, for which he held their receipts. He concluded by saying:—"I have been informed and believe that

it is the intention of John Clancy to print and circulate further documents of a like nature."

On the 26th January the defendant applied to the Queen's Bench (consisting of Johnson and Boyd, JJ.), that the injunction should be dissolved, and that the action should be remitted to the Recorder of Dublin. The defendant in his affidavit stated that he was a candidate, and he issued the circular, as he believed the plaintiff was disqualified. He referred to the deed of arrangement, and stated that about two months before the election the plaintiff proposed to make a further payment to his creditors, provided they would make some abatement, and give a receipt in full. The creditors agreed to accept payment of a sum which would make, with the 5*s.* already paid, 15*s.* in the £1, and to give a receipt in full, giving a rebate of 5*s.* in the £1 as trade discount. This balance of 5*s.* never was paid. One of these payments, the defendant stated, was made after the day of nomination. The polling resulted in the return of the plaintiff by a majority of 506, and the plaintiff was declared elected, but the defendant petitioned against the election (1). The affidavit further stated, that in 1890 the plaintiff brought an action for slander against one Doyle, that the action was remitted to the Recorder, and by him dismissed with costs. Execution was subsequently issued for the costs, but when the sheriff seized the execution was resisted by a statutory declaration made by the plaintiff's wife, that she owned the furniture in the house, whereupon the sheriff returned *nulla bona*. In January, 1901, the plaintiff paid the costs, but, as the defendant, had no visible means of paying the costs of the action.

An affidavit by Mr. John Gore, the plaintiff's solicitor, which was used in the Court of Queen's Bench, but not mentioned in the order, stated that the defendant intended to publish the circular, and to put it upon hoardings throughout the city.

(1) The petition was heard on the 2nd, 3rd, and 10th April, 1901, by Mr. Commissioner Hill Smith, who held that the plaintiff was disqualified on the ground that the plaintiff had made an arrangement with his creditors within five years, before the date of the election, within the meaning of Rule 12 (4) (*c*) in the Schedule to the Local Government (Application of Enactments) Order, 1898.

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The Queen's Bench refused both applications of the defendant, and the defendant appealed.

Healy, K.C., and *Philip White*, for the appellant:—

The circular was in the ordinary form stated in Rogers on Elections, p. 684, which it is necessary to serve if the candidate intends to claim the seat. He must serve notice on every voter that he is throwing away his vote. The plaintiff was disqualified if he had made an arrangement with his creditors within five years before the election: Vanston, p. 179; *Galway Case* (1); *Drinkwater* v. *Deakin* (2); *Tipperary Case* (3); *Borough of Horsham* (4).

In the case of trade libels the Court has often granted injunctions: *Punch* v. *Boyd* (5); but an interlocutory injunction ought not to be granted when the defendant swears that he will be able to justify the libel, and the Court is not satisfied that he may not be able to do so: *Coulson* v. *Coulson* (6); *Bonnard* v. *Perryman* (7). *Saxby* v. *Easterbrook* (8) is the first reported case in which an injunction was granted by a Court of law in a libel case, but it was not applied for till after verdict and judgment.

Bushe, K.C., and *Dudley White*, for the respondent:—

If this injunction is dissolved it will be open to the defendant to publish a number of letters of a defamatory nature against the plaintiff's wife. We say that the plaintiff is not disqualified: the arrangement which he made was of a private nature, and it was void under the Deeds of Arrangement Act, because the deed was not registered. If it was a mere nullity, it cannot disqualify. We submit that the circular was false and malicious. A circular containing inaccurate statements as to a man's financial condition will be restrained by injunction: *Hill* v. *Hart Davies* (9).

Even if the Court should be of opinion that the injunction should be dissolved as to the issue of the election circular, we

(1) 2 O'M. & H. 46.
(2) L. R. 9 C. P. 626.
(3) 2 O'M. & H. 31.
(4) 1 P. R. & D. 245.
(5) 16 L. R. Ir. 476.
(6) 3 *Times* L. R. 846.
(7) [1891] 2 Ch. 269
(8) 3 C. P. D. 339
(9) 21 Ch. D. 798.

submit it ought still to be continued as to the declaration made by the plaintiff's wife.

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Feb. 7.

FITZGIBBON, L.J. :—

The way in which this case comes before us must be considered, to understand how we propose to deal with it.

On January 14 last, Mr. FitzGerald, the plaintiff, issued a writ for libel and for an injunction against Mr. Clancy, the defendant. On the afternoon of the same day he obtained an injunction *ex parte*, upon certain terms. This injunction was to remain in force "until further order." Both under the Judicature Act and under the settled practice, the granting of an injunction "until further order" leaves it open to reconsideration by the Court at any moment, and the Court which has granted such an injunction has full jurisdiction, in its discretion, to continue or to dissolve it by an order made on further consideration.

An application was made by the defendant to the King's Bench to dissolve the injunction and to remit the action to the Recorder. This application was made on January 26, to a Divisional Court of two Judges, one of whom had been present when the original order was made. That application was refused, and it has been stated to us that the reason of the refusal was that the Judges considered that, with the Court so constituted, the application was in the nature of an appeal from the former order, and that, being the same Court which had granted the injunction, they had no jurisdiction to interfere with it, and that they were called on to consider only whether the original order was right or wrong.

We cannot take that view ; it is against the General Orders under the Judicature Act, and it is against the previous practice of the Court of Chancery. On the application to dissolve the interlocutory injunction granted until further order the Court might have dissolved it, even though it had been rightly granted. The injunction might have been dissolved because it had fulfilled its purpose, or because the defendant had shown good cause for so doing, or even because, on further consideration, the Court, in its discretion, thought it right to discharge it.

We have now to deal with an appeal from the second order, which refused, with costs, to disturb the injunction, and also

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refused to remit the action; and we have to consider the propriety, not merely of continuing, but of originally granting, the injunction.

The jurisdiction to grant an injunction, interlocutory or final, to restrain the publication of an alleged libel, as known to our law, is peculiar and limited. It used to be said that the Court of Chancery could not grant such an injunction, because doing so would infringe upon the principle of Fox's Act. That proposition may be too wide, or not absolutely correct, and, at least under the Judicature Act, the power to grant injunctions against libels exists, but its exercise is very strictly limited. I believe that we all agree that an injunction to restrain a publication merely because it is defamatory or injurious is unknown. The publication must be proved to be also false and malicious, and if it be a question reasonably open for trial, whether the alleged libel, though defamatory, is true or privileged, or is "no libel," the granting of an injunction would be wrong in principle. I cannot find, and I see no reason to believe, that the Lord Chief Baron, who was the head of the Court that granted this injunction, expressed or entertained any opinion upon this point contrary to what I have stated. I assume that, when this injunction was granted, the Court was satisfied that the publication was absolutely false, actually malicious, defamatory, and immediately injurious.

The materials on which the Court was asked to come to that conclusion are left in doubt, because the order purports to be based upon the affidavit of the plaintiff only, and that affidavit mentions only one single publication, the printed circular, which affected the plaintiff's candidature. The plaintiff says, in general terms, at the end of his affidavit—"I have been informed and believe that it is the intention of John Clancy to print and circulate further documents of a like nature, and I pray this Honourable Court to grant an injunction to prevent his doing so." I must read that statement as referring only to documents affecting the plaintiff's candidature similar to the circular, and, unless the defendant intended to continue the publication of further libels of that character, the injunction should not have been granted. It does appear that Clancy intended to go on with the publication of the circular, but only to the voters coming to poll on the next day.

There is in existence, apparently sworn on the same day, an affidavit of the plaintiff's solicitor, referring to a statutory declaration of the plaintiff's wife, in which she had claimed the ownership of the furniture in her husband's house, but this declaration had nothing to do with the plaintiff's position as a candidate, though it affects the question of his solvency, or of his "visible means." But that affidavit does not appear upon the order. Mr. White has told us that he applied subsequently to one of the Judges to insert t in the readings, and that the Judge refused to do so. The omission, therefore, cannot be treated as having occurred *per incuriam*. It is possible that the Court may have seen and been influenced by Mr. Gore's affidavit on the question of malice, but the order must stand or fall upon the readings which are on its face.

What is the injunction? It is unqualified, and it is not confined to libels. The words "libel" or "defamatory publication" do not appear in it. The injunction, upon which attachment might ensue, orders—

> "That the defendant, his agents and servants, and every of them be restrained until further order from printing, publishing, circulating, posting, or in any wise making public, any documents as to the financial position, *status*, or character of the plaintiff, as to the incapacity or disqualification of the plaintiff from being elected as councillor for the county borough of Dublin."

This is an absolute and mandatory injunction against making public, in any way, or to any person, anything relating to the vital matter of the candidate's legal qualification, his financial position, his *status* or character, his incapacity or disqualification as a candidate for election as a County Councillor. It is impossible that such an injunction can stand; it must be discharged as going beyond any precedent or any legal principle. It purports to restrain, under pain of attachment, acts which might not merely be lawful, but acts of publishing what it would be the duty and interest of everyone concerned in an election to make known, namely, the incapacity and disqualification of a candidate for a public office. Its terms would cover even the service of the petition by which Mr. Clancy claims the seat.

But, granting that it cannot stand as it is, we are asked to

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modify it. In my view, when an interlocutory injunction is altered, the amended order must take the place of the original order. We are asked to keep it standing, so far as it relates to the second publication, namely, posting the statement that the plaintiff's wife had made a declaration that the furniture, which was being seized for his debt while he was being nominated, was not his. I cannot see my way to thus limiting the right to publish matter material to the qualifications of a candidate at an election. It is within the privilege of any person having a legitimate interest in a public election to make known anything material to the question whether a voter ought to vote for the man or not. I cannot lay down, as a rule of law to be enforced by injunction and attachment, that voters shall not be informed that a candidate does not own even the bed he sleeps in, or the chair he sits on.

It might be otherwise, if the statement was absolutely false. I believe that the Queen's Bench, when making this order, must have been satisfied that this publication was absolutely false, as a statement of disqualification, and that the plaintiff had paid all his debts. But how do the facts now appear? The statute disqualifies any man who has made an arrangement with his creditors within five years before the election. In 1899 the plaintiff executed a deed of arrangement with his creditors; but it was of a private nature, signed by seven or eight creditors, and the plaintiff swears that it was not registered, nor intended to be registered, because he intended to pay his debts in full subsequently. That raises a difficult question, namely—What is the effect of the avoiding clause of the Arrangement Statute? It enacts that the deed is void unless registered. We must not, in granting an injunction against libel, prejudge a question of disqualification which will be open on the petition for the seat. It will be a question whether the disqualification for non-payment of 20*s.* in the £1 includes a man who has attempted to pay less by executing a deed of arrangement, void for non-registration, or who has effected a composition by agreement with some of his creditors by a private deed; in other words, whether the validity of the arrangement under the law of Bankruptcy is essential to the disqualification under the law of Local Government?

There is also a question as to the determination of the disquali-

fication, namely, whether a man who has made an arrangement within five years, and who is thereby disqualified when nominated, may purge the disqualification by paying his creditors in full after nomination, but before election. I believe that the Court below held that this allegation of disqualification was malicious and absolutely false, on evidence that the plaintiff had paid his debts in full, and on the assumption that the defendant knew that before the publication. Reading the plaintiff's affidavit *ex parte*, I am not surprised that the Court should have thought that it was dealing with a man who had maliciously published a disqualification which he knew to have been removed. But here again, what are the facts? The plaintiff had admitted in the deed of arrangement that he owed a certain sum of money, viz. £123 9*s.* 8*d.* He certainly has not paid that amount in full, he has paid only 15*s.* in the £1 in cash; yet he says—"I have paid my debts in full, I have discharged them." This raises another difficult question—Is it enough, in order to get rid of the disqualification, to pay, not 20*s.* in the £1, but 15*s.*, and to call the difference "trade allowance?" Is that "payment in full"? It may be that the creditors were glad to get 15*s.* of a bad or doubtful £1.

But this payment was subsequent to the nomination, and the question still remains. If the plaintiff was not a qualified candidate when he was nominated, could he be a qualified candidate when the electors came to vote for him? Therefore, in the substance of the case, there were questions, and facts, upon which Mr. Clancy swears that he believed, and on which he had some ground for believing, that his opponent was disqualified. If so, his proper course, and the only course by which he could claim the seat, was to give notice of the disqualifying facts to every voter before the poll. One of the grounds for imputing malice was that Clancy had already published the notice so fully, before the injunction, that the further publication which was restrained was unnecessary, and was only supererogatory defamation. But the proper and recognised manner of giving the notice of disqualification on which a seat is to be claimed is to hand it to each voter as he comes to the poll. It would be open to an elector to say—"I was away from home before the election"; or "I got some printed things which I threw away without reading them"—

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or "I did not see the posters"—and "I knew nothing of Fitz Gerald's financial position when I gave my vote." I therefore think that the alleged libel—both as actually published and as intended to be published—raises questions both of justification and of privilege, and it seems to me to be wrong to restrain a man from publishing matter in which he has a lawful interest, which he alleges to be true, and which he has some foundation for believing to be true, and which is the foundation of a legal proceeding on his behalf.

As regards the statutory declaration made by the plaintiff's wife, it is not denied that she made it, or that it was true when made. For the purpose of defeating an execution for debt against the plaintiff, she declared that the property seized was not his. It is not a usual symptom of willingness or ability to pay 20*s.* in the £1 that a man's wife should prove that all the furniture in his residence is hers, and that the sheriff should be thereby driven to interplead, or to return *nulla bona*. Such a fact is not necessarily immaterial, nor is the publication of it by a rival candidate necessarily malicious, when the impecunious husband is seeking election as a County Councillor.

These considerations have led us to the conclusion that the King's Bench ought to have discharged the injunction, and that we must allow the appeal against the refusal to do so.

The King's Bench was also moved to remit the action to the Recorder, and this is also portion of the appeal. In the Court below the defendant asked that the costs of the motion should be costs in the action. Mr. Healy said that this motion was only a make-weight. It is often hard that a defendant should be sued by a person of no means, but the fitness of the case to be prosecuted in the High Court must be decided by a number of considerations —including the difficulty of the case, the importance of the issues, and so on. Lord Justice Barry often said that the object of the Act was to prevent "sham actions" from being brought in the Superior Courts, but this action raises important questions. We had to consider something like it when asked to remit an action against a presiding officer for turning a poll clerk out of a booth: we also had the case of two actions against the Waterford Poor Law Guardians for assaults by their officers: we decided that

these were proper cases for the High Court, because questions of public and general importance were involved. The only ground upon which it is sought to remit this case is that the plaintiff is unable to pay costs. But the Act was not intended to be applied to such a case as this, where the cause of action, if it exists, is substantial. We refuse that part of the appeal. The injunction must now be discharged, but the refusal to remit must be affirmed; the appellant will have the costs of the appeal, so far as dissolving the injunction is concerned, and each party will abide his own costs of the double motion in the Court below.

WALKER, L.J. :—

I concur. There is jurisdiction to grant an injunction in a libel action *ex parte* where a writ is issued. But I think the decisions are to the effect that the Court will not interfere by injunction before a verdict is found in a common law action in which damages can be given. I express no opinion further as to the libel, or as to the petition. That is a question to be decided by a competent tribunal. What we are dealing with in this case is an injunction granted *ex parte*, and it is a well-settled doctrine in courts of equity that if a plaintiff chooses to obtain an order behind a party's back, he does so at his own peril, when it is challenged. If it be, what is the injunction? It is, that the defendant, his agents and servants, be restrained until further order from printing, publishing, circulating, posting, or in anywise making public, any document as to the financial position, *status*, or character of the plaintiff, as to the incapacity or disqualification of the said Thomas J. Fitz Gerald from being elected as a Councillor for the borough of Dublin. I see no reason to split it up in the way that Mr. Bushe proposed to do; and even if we did—even if it had the little leaven in it which Mr. Bushe contended could be imported into it—I do not think it should have been granted. The only evidence which we can consider consists of the readings on the order, that is, the affidavit of the plaintiff. In that affidavit the plaintiff refers to the fact that Clancy was standing as a candidate for the election for which he was a candidate; he refers to the circular, to the deed of arrangement, and states that he holds receipts from his creditors. He then says :—

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"I have been informed and believe that it is the intention of John Clancy to print and circulate further documents of a like nature, and I pray this Honourable Court to grant an injunction to prevent his doing so." That must mean documents of a like nature with the publication he had mentioned—the circular.

I don't say that under certain circumstances that may not be the subject of an injunction, but in order to do so, it must be shown that the ground of disqualification was absolutely baseless. The disqualification alleged here derives support from the documents stated, and also from the petition which has been filed, and the petitioner has furnished the material guarantee of lodging £50 as security. It is impossible in the face of that to say that the statements are absolutely baseless; and in order that Clancy may assert his position, it was necessary for him to do that which the order prevents him from doing in pursuance of his rights, viz. to give notice to the voters that they were throwing away their votes.

Under these circumstances, I think the injunction should not have been granted, and ought to be dissolved on the terms stated by Fitz Gibbon, L.J.

HOLMES, L.J.:—

The plaintiff and defendant were rival candidates for a seat in the Dublin Corporation; and after the nomination the defendant had a notice printed, stating that the plaintiff was disqualified for election by reason of his having made an arrangement or composition with his creditors, and cautioning electors from giving him their votes. Notices of this kind have been often used for the purpose of bringing home to voters knowledge of a disqualification under which a candidate labours, and in some cases have been relied on as the ground for giving the seat to his opponent without a new election. On the day before the poll an *ex parte* application was made for an injunction, restraining the defendant from circulating the notice, and an order to this effect was made. I am satisfied from the terms of the order, taken in connexion with the readings recited in it, that the injunction was directed against this document alone, or a document of the same purport;

and that its effect would be to restrain the defendant from having the notice handed to voters as they came to the poll—the usual mode in which a notice of the kind is circulated, if the intention is to claim the seat.

I am not to be taken as assenting to Mr. Healy's proposition, that the Court had no jurisdiction to grant the injunction, or that it was unconstitutional to do so; but I think that under the circumstances it ought not to have been given *ex parte*. The mischief which might be caused to the defendant by the injunction, if the statements in the notice were true, was at least as great as the mischief which the plaintiff might sustain by reason of its circulation if they were false. The defendant resided in Dublin; and if even a few hours' notice of the application had been given him, I have no doubt that he would have been able to satisfy the Court that the order ought not to have been made. The defendant took the proper course in applying to have it rescinded; and I am clearly of opinion that he ought to have succeeded upon what was then, and is now, practically admitted. It appeared that the plaintiff, within the last five years, compounded with his creditors for five shillings in the pound, and that although additional sums have since been paid, and although all or most of them have given receipts in full, in hardly any case has the actual amount of the debt been discharged. The defendant has presented a petition, claiming the seat or the avoidance of the election on these grounds; and upon the hearing thereof, technical questions of some difficulty, on which I offer no opinion, must be decided by the proper tribunal; but I do not see how, under the circumstances, an injunction restraining the publication of the notice can be supported. This was hardly disputed by Mr. Bushe; but he has sought to sustain a portion of the order by what seems to me to be an ingenious afterthought. He says that it was not confined to the notice, but was also intended to apply to another document which the defendant, as he informed the plaintiff's solicitor by letter, had printed and intended to circulate. We have seen this document, and it purports to be a copy of a statutory declaration made by the plaintiff's wife on the day of the nomination, stating that the furniture in the plaintiff's house belongs to her, and showing on its face

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Holmes, L.J.

that the object of it was to protect this furniture from seizure under process against the plaintiff.

My reason for describing Mr. Bushe's contention as an afterthought is that not only are the letter and the solicitor's affidavit referring to it not read on the order for the injunction, but also that Mr. Justice Boyd, on being asked to insert these documents in the order, declined to do so. This satisfies me that it was not contemplated that the injunction should extend to the publication of the declaration. But even if it were, it is not denied that the declaration was actually made, and made for the purpose alleged. It is no doubt stated that the plaintiff, at a subsequent time, paid the debt for which the furniture was being seized; but I am unable to see how if the declaration had been published, it could have been made actionable. For these reasons I concur in holding that the appeal must be allowed.

Solicitor for plaintiff: *John Gore.*
Solicitor for defendant: *J. J. O'Meara.*

R. D. M.

K. B. Div. 1902.

Jan. 15.

REX (COMMISSIONERS OF PUBLIC WORKS) *v.* THE CHAIRMAN AND JUSTICES OF CO. DOWN (1).

Summary jurisdiction—Appeal to Quarter Sessions—Practice—Public Health (Ireland) Act, 1878 (41 & 42 *Vict. c.* 52), *sect.* 269.

In appeals to Quarter Sessions under the Public Health Act, 1878, a code of procedure, complete in itself, is provided by section 269, and notice of appeal need not be served on the individual justices who adjudicated at Petty Sessions. *Reg.* (*Lyster*) v. *Justices of Queen's Co.* ([1901] 2 Ir. R. 132, n.) followed.

MANDAMUS.

The Commissioners of Public Works, after due notice, had been summoned to attend at Ardglass Petty Sessions upon a complaint under the Public Health (Ireland) Act, 1878 (41 & 42 Vict.

(1) Before PALLES, C.B., and JOHNSON, and KENNY, JJ.

c. 52), for permitting the existence of a nuisance on premises owned by them (Ardglass Quay), and the Justices thereupon, on the 3rd April, 1901, had ordered them as such owners to abate the nuisance complained of within three months. The Commissioners of Works appealed to Quarter Sessions, and served notice (under the Public Health (Ireland), Act, 1878, c. 52, s. 269) of intention to appeal on the ground that the Justices had no authority to make the order. The notice of appeal was directed to and served on the solicitor for the sanitary authority and on the clerk of petty sessions. On the hearing of the appeal it was contended that the notice should have been served upon, or at least addressed to, the Justices who had adjudicated at petty sessions: *Ex parte Curtis* (1), and, *contra*, *Reg.* (*Clarke*) v. *Justices of Wicklow* (2), being cited; and the Chairman declined to entertain the appeal. The Commissioners now moved to make absolute an order for the issue of writs of certiorari and mandamus with a view to having the appeal re-instated and heard at Quarter Sessions.

Raphael, for the Commissioners.

Serjeant Dodd, and *W. M. Whitaker*, for the local sanitary authority.

In addition to *Ex parte Curtis* (1) and *Reg.* (*Clarke*) v. *Justices of Wicklow* (2), counsel referred to *Reg.* (*M'Grath*) v. *Justices of Wicklow* (3), and *Reg.* (*Lyster*) v. *Justices of Queen's County*, there noted (4).

THE COURT declined to allow the question to be argued anew, as it had been the subject of express decision in *Lyster's Case* (4). The order for the issue of writs of certiorari and mandamus was accordingly made absolute.

Solicitor for applicants: *W. M. Lane.*
Solicitor for the respondents: *S. B. Martin.*

A. E. R. J.

(1) 3 Q. B. D. 13.
(2) 30 L. R. Ir. 465.
(3) [1901] 2 I. R. 130.
(4) [1901] 2 I. R. page 132, n.

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Dec. 10, 12, 14.

REX (CODDINGTON) *v.* LOCAL GOVERNMENT BOARD (1).

Labourers (Ireland) Acts, 1883–1896—*Power of sanitary authority compulsorily to acquire a second half-acre plot for the purpose of adding same to an existing cottage and half-acre allotment.*

Under sect. 16 of the Labourers (Ireland) Act, 1885 (48 & 49 Vict. c. 77), a sanitary authority which has already acquired a cottage and half-acre plot under the Labourers Acts, 1883–1896, has power to acquire by compulsory purchase an additional plot of ground to be added to that already acquired by them, provided that the limit of one statute acre imposed by the Labourers (Ireland) Act, 1892 (55 & 56 Vict. c. 7), be not exceeded.

CERTIORARI.

This was an application to make absolute, notwithstanding cause shown, a conditional order, dated the 4th September, 1901, that a writ of certiorari should issue directed to the Local Government Board of Ireland and to the Council of the Meath rural district of Drogheda Union to remove and quash a Provisional Order of the Local Government Board, dated the 29th June, 1901 ("The Meath R. D. of Drogheda Union Labourers Order, 1901"), made in pursuance of the Labourers (Ireland) Acts, 1883 to 1896, and all other orders confirming the schemes authorised thereby—on the grounds (*a*) that no reasonable efforts to obtain the required lands by agreement or exchange were made; (*b*) that no proof was given that such efforts had been made; and (*c*) that the terms of the Labourers (Ireland) Acts, 1883 to 1896, were not complied with—"or that" a writ of prohibition should issue directed to the Board and to the said rural district council, or to the said council singly, prohibiting them and all others concerned from further proceeding with, enforcing, or otherwise acting in execution of or under the said Provisional Order.

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and MADDEN, JJ.

The facts were not in controversy, and, as stated by the applicant (Col. J. N. Coddington), in the affidavit on which the conditional order was grounded, were to the following effect. The applicant was a large ratepayer of the district in question (the Drogheda Union). Under the Labourers (Ireland) Act, 1883, and under Provisional Orders duly confirmed, the guardians of the Union had acquired certain lands (half-acre plots), and thereon had erected labourers' cottages in or about the years 1890 to 1896. In 1900, in pursuance of representations duly made, schemes had been duly lodged and petitions presented to the Local Government Board for their confirmation, and, in November, 1900, the usual Inquiry was held by an inspector of the Board. This Inquiry dealt with (*a*) cottages to be built and plots allotted; (*b*) plots to be purchased and let to tenants of existing cottages; and (*c*) cottages to be acquired and repaired and plots to be allotted. The existing cottages above-mentioned were cottages with half-acre plots, erected and acquired under the former schemes. At the Inquiry several of the parties interested as owners and occupiers of plots so to be taken and purchased were represented by their solicitors; and objection was taken on their behalf that, with reference to the additional half-acres to be let to tenants of existing cottages, the rural district council had no power to acquire the same compulsorily without having first used all reasonable means to obtain the lands by agreement or exchange; that the Act of 1883 enabled the guardians (now the rural district council) to acquire a site not exceeding half an acre (statute measure) for the purpose of erecting a labourer's cottage thereon; that the Act of 1892, read with the previous Act, gave them power to acquire a site not exceeding one statute acre (or an additional half-acre) for the purpose of *erecting* a house thereon; but that these Acts gave the rural district council or guardians no power to acquire lands for allotment to existing cottages, and that the only power they had to acquire lands for allotment to existing cottages was under section 16 of the Labourers Act, 1885; that this Act provided, amongst other things, that a sanitary authority having any existing cottage might purchase any lands for the purpose of allotment to the tenant of such cottage, being an agricultural labourer, or might, without having or purchasing any

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existing cottage, purchase or take on lease for a term of years by agreement tracts of land for allotment; that this section further provided that the power to purchase lands and cottages should include the power to take lands and cottages for a term of years, and that these powers were qualified by section 12 of the Labourers (Ireland) Act, 1886, which enacted that, notwithstanding anything contained in section 16 of the Labourers Act, 1885, an improvement scheme made by a sanitary authority might, after all reasonable efforts to obtain the amount of land required in the same locality by agreement or exchange had, in the opinion of the Local Government Board, been *bona fide* made and had failed, propose, and a Provisional Order confirming the same might sanction, the purchase, by such sanitary authority, otherwise than by agreement, of any land for the purpose of allotting half an acre (1) to the occupant of an existing cottage. It was also then objected that it was admitted by the clerk of the union that no attempt had been made to acquire the required additional lands by agreement or exchange, and that the very notices which had been served on the owners and occupiers of the lands proposed to be taken (which was the first intimation received by them of the proceedings) were the usual (red print) notices of intention compulsorily to acquire the lands, clearly showing that no attempt had been made to acquire the lands by agreement or exchange—and that consequently the provisions of section 12 of the Act of 1886 not having been complied with, the rural district council (or guardians) could not now acquire the lands compulsorily, *i.e.* acquire an additional half-acre for an existing cottage.

Col. Coddington stated that at the Inquiry no evidence was offered or given in support of the scheme to prove that any attempt had been made to acquire the lands by agreement or exchange, and that in his belief no such attempt was made; and that notwithstanding these objections, and (as the applicant alleged) in the entire absence of evidence of any attempt to acquire the plots by agreement or exchange, a Provisional Order, dated the 29th June, 1901, was passed, empowering the council of the Meath rural district of the Drogheda Union to put in force the

(1) Now "a plot not exceeding a statute acre" (55 Vict. c. 7, s. 3).

compulsory powers given by the Lands Clauses Acts; and the council were proceeding under the Provisional Order to acquire lands compulsorily for the purposes mentioned, and in particular to take and purchase half-acres to be allotted to cottages already erected on half-acre plots under the former schemes.

As cause against the order, an affidavit was filed by Mr. H. M. Swayne, the Secretary of the Board, referring to the various orders and petitions, and to the proceedings on the Inquiry of November, 1900, alleging that Colonel Coddington was not the owner or occupier of any of the lands proposed to be purchased or taken otherwise than by agreement, and submitting that, on the facts and on the statutes applicable thereto, the Conditional Order should be discharged.

On behalf of the district council an affidavit was also filed by way of cause, stating that it was perfectly well known throughout the district, and a matter of public discussion and notoriety when the representations were being made and the schemes prepared and lodged, that the owners and occupiers whose lands it was proposed to take were utterly opposed to any sale by agreement, so much so that it was perfectly plain to the guardians that it would be impossible to get the land by agreement; and it was only after this determination not to sell by agreement had been shown in the most open way that the notices as to compulsory acquisition were served on behalf of the council; that the several owners and occupiers concerned had either by verbal protest or by letter protested and refused to consent to any land being taken; and it was common knowledge that the occupiers' opposition was to the taking of the lands at all, and not to the procedure or to the terms on which they should be taken; that since the making of the Provisional Order eight petitions had been lodged with the Privy Council, and in all these the same point was being raised as that now relied on; and the district council submitted that the Privy Council was the proper tribunal to decide on these objections, and that, as the present applicant was not a petitioner, and as none of his lands were being acquired, his application was merely an attempt to oust the jurisdiction or anticipate the decision of the Privy Council. It was also stated that the labourers

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had agreed to pay an additional weekly rent for the lands proposed to be added to their allotments, and that thus the ratepayers would not be affected by the proposed scheme; and further, it was submitted that certiorari could only involve useless expense to the ratepayers in the preparation of a new scheme, the holding of a new inquiry, and (as no lands could be got by agreement) the hearing of a new set of petitions by the Privy Council.

The Provisional Order of the 29th June, 1901, dealt with the entire scheme as lodged by the district council with the Local Government Board. The eight petitions to the Privy Council were conversant only with a portion of the scheme; and accordingly the Local Government Board, in exercise of their statutory powers, divided their original order into two (as of same date), separating the portion under appeal from the rest of the scheme.

Ignatius J. O'Brien, K.C., and *Hume, K.C.* (*P. O'C. White* with them), for the applicant.

S. Ronan, K.C., C. L. Matheson, K.C., and *J. Chambers*, for the Local Government Board.

Healy, K.C., and *D. Kehoe*, for the district council.

The two questions in controversy during the argument were: (*a*) whether, under the circumstances, certiorari lay or prohibition; and (*b*) whether, under the Labourers (Ireland) Acts, the sanitary authority possessed any power to add a second half-acre plot to an existing allotment of a cottage and half-acre of land. The Court expressed no opinion on the first question; upon the second the following enactments were discussed:—The Labourers (Ireland) Acts, 1883-1892 (46 & 47 Vict. c. 60; 48 & 49 Vict. c. 77, sect. 16; 49 & 50 Vict. c. 59, sect. 12; 54 & 55 Vict. c. 71, sect. 7; 55 & 56 Vict. c. 7, sect. 3); and the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37).

Cur. adv. vult.

The judgment of the Court was delivered by—

MADDEN, J. :—

The application before us in its amended form is conversant with two provisional orders of the Local Government Board, made in pursuance of the Labourers (Ireland) Acts, 1883–1896, at the instance of the Meath rural district of Drogheda Union. The prosecutor seeks to have these orders quashed upon the ground of an illegality, which, he alleges, is common to both. A portion of the schemes embodied in these orders consists in the compulsory acquisition of half-acre plots of ground, for the purpose of letting the plots so acquired to the tenants of existing cottages already provided in the district by the sanitary authority. The prosecutor contends that land cannot be compulsorily acquired for this purpose, otherwise than under the provisions of the 12th section of the Labourers (Ireland) Act of 1886; that the power of compulsory purchase under that section can only be exercised "after all reasonable efforts to obtain the amount of land required in the same locality by agreement or exchange have in the opinion of the Local Government Board been *bona fide* made and failed"; and that the entire scheme is *ultra vires* and void, inasmuch as this statutory condition precedent has not been complied with.

The conditional order originally granted dealt with a provisional order of the Local Government Board, dated the 29th June, 1901, which was conversant with the entire scheme promoted by the district council. When the case was opened, it appeared that petitions had been presented against a portion only of the scheme, and the Local Government Board, in exercise of their statutory powers, divided the order, separating the portion under appeal from the rest of the scheme. Accordingly, we have now before us two orders of the Local Government Board, one of which, that under appeal, is provisional only, inasmuch as it may be confirmed, disallowed, or amended by the Lord Lieutenant acting with the advice of the Privy Council in Ireland, under the provisions of section 12, sub-section 3 of the Labourers (Ireland) Act, 1885. The other order has become absolute under the provisions of the 2nd sub-section of the same section, and in

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regard to this order it is enacted by sub-sect. 4 that it "shall be of the same effect as if it had been confirmed by Parliament."

The Local Government Board and the district council contend that both orders are valid under the provisions of the statute to which I shall presently refer. They further submit that the validity of neither can be questioned by writ of certiorari, and this for very different reasons. The order which has become absolute has, they argue, the same operation as the Act of Parliament which was required for the confirmation of Provisional Orders under the Act of 1883. The order under appeal is merely inchoate, having no operation *per se*, as its final form has not yet been determined. Such an order, they contend, is not the subject of certiorari, and, as prohibition does not lie as against the Lord Lieutenant in Council, neither can the Local Government Board be prohibited from applying for confirmation of the order.

The question which has been raised on the construction of the statutes as to the validity of the orders before us is of general interest and importance. It has been stated by counsel for the Local Government Board that several improvement schemes have been passed by the Privy Council to which the same objection was applicable. The objection does not appear to have been taken in any of these cases. But it has been specifically raised in the present proceedings, and I have been led by the arguments addressed to us to form a definite opinion on the point. I therefore do not think it necessary to deal with the questions which have been raised as to the jurisdiction of this Court to deal with the particular orders in the present case by writ of certiorari, in regard to which I express no opinion.

The general question as to the validity of the provisional orders may be thus stated. Can a sanitary authority which has already acquired a cottage and plot of ground under the Labourers Acts subsequently acquire by purchase an additional plot of ground to be added to that which has been already acquired, otherwise than under the 12th section of the Act of 1886? If this power exists, it is given by the 16th section of the Act of 1885, on the consideration of which this case ultimately depends. But in order to understand this section it is necessary to bear in mind the powers conferred by the principal Act, that of 1883.

The power of purchasing land, for the purposes of a scheme, is conferred on the sanitary authority by the 16th section of that Act, which enacts that "for the purposes of such purchase the Land Clauses Acts shall be incorporated with this Act." All these Acts are to be read and construed as one code, from which it follows that wherever the word "purchase" occurs, unqualified by the context, it includes compulsory purchase under the provisions of the Land Clauses Acts, as interpreted by the 21st section of the principal statute.

The objects which the Legislature had in view are clearly indicated in the 5th and 6th sections of this Act. They are these: to provide a sufficient number of labourers' cottages for the requirements of the locality; to ensure that each building should be of a sanitary character; with the addition of a system of cottage allotments which was more fully developed in the subsequent statutes. Under this statute a plot or garden was necessarily allotted to each cottage, not exceeding in area half a statutory acre. The cottage must be erected by the sanitary authority; it had no power to acquire an existing cottage.

I now turn to the 16th section of the Act of 1885. It first deals with existing cottages in a bad state of repair. They may be acquired voluntarily or compulsorily. This, as I have pointed out, is the effect of the use of the term "purchase" without qualification. It then deals with existing cottages of which it cannot be predicated that they are in a bad state of repair. As we should expect, such a cottage can be purchased only by agreement. When purchased, it can be added to and improved, for the purpose of being let to an agricultural labourer. The sanitary authority may purchase by agreement half an acre of land and allot it to the occupant of "any such cottage," by which I understand a cottage of the class referred to in the immediately preceding part of the section. Then follows the enactment with which we are immediately concerned: "A sanitary authority having any existing cottage, or purchasing any existing cottage, may purchase any land for the purpose of letting it to the tenant of such cottage, being an agricultural labourer, or may, without having or purchasing any cottage, purchase or take on hire for a term of years by agreement tracts of land, to be parcelled out in allotments to be let to any

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agricultural labourers living in any neighbouring village or town, if such land is so situated as to be suitable for that purpose, provided that the land to be let to any one such person shall not exceed half an acre," a limit extended to one acre by the Act of 1892. A proviso is added, engrafted on the portion of the section empowering the sanitary authority to purchase land by agreement to be allotted to the occupants of existing cottages, the effect of which is to preclude the authority from allotting land to persons who are not tenants of dwelling-houses, except in the case of town or village allotments.

Throughout this section the distinction is clearly marked between authority to "purchase," which, as I have pointed out, includes compulsory purchase, and authority to "purchase by agreement"; and it is to be particularly noted that land for "allotment," either to occupants of existing cottages, or to dwellers in adjacent towns or villages, cannot be acquired otherwise than by agreement.

Bearing this distinction in mind, the 12th section of the Act of 1886 is intelligible. It deals exclusively with lands acquired for the purposes of allotment. It commences with the words—"Notwithstanding anything contained in the 16th section of the Labourers (Ireland) Act, 1885"—which refer to the qualification imposed by that section on the word "purchase"; and it enables the sanitary authorities to exercise compulsory powers, provided they have in the first instance made reasonable efforts to obtain by agreement the required amount of land "in the locality," words which are intelligible in the case of an allotment scheme, but inapplicable to the addition of a further piece of ground to the plot occupied by an existing cottage.

The provisions of this Act have, in my opinion, no application to the power given to sanitary authorities by the 16th section of the Act of 1885 to "purchase" land for the purpose of letting it to the tenant of a cottage which they already possessed at the passing of that Act, or subsequently acquired by purchasing under its provisions. They could have, at the passing of the Act, no cottage without a plot attached to it; and, as the section contemplates a letting under its provisions to the tenant of an existing cottage, it follows that an addition can be made under its provi-

sions to an existing plot of ground, provided the limit of one acre be not exceeded.

The idea underlying the 16th section of the Act of 1885 seems to be that where an existing cottage is purchased by agreement, the land to be originally allotted to its occupant should be also taken by agreement. There is undoubtedly some difficulty in harmonizing the provisions as to such cottages with the portion of the section dealing with compulsory purchase. I do not think it necessary to discuss the questions which were suggested by the wording of this section, for, however they may be answered, they cannot affect either of the propositions upon which my judgment is based. These are, first, that the term "purchase," when unqualified by reference to agreement, includes compulsory purchase; and, secondly, that the 12th section of the Act of 1886, notwithstanding the apparent generality of some of its provisions, is conversant solely with the enactments of the 16th section of the statute of 1883, by which provision is made for the purchase of land by agreement for the purpose of allotments. For these reasons I am of opinion that the provisional orders under discussion are warranted by the statutes under which they have been made, and that the application to make absolute the conditional orders should be refused, with costs to the district council.

LORD O'BRIEN, L.C.J.:—

In concurring I must confess that I entertain even now grave doubt upon the point. In view, however, of the fact that the practice appears to have existed unquestioned for a considerable time, I should be slow to overrule it.

GIBSON, J.:—

I agree, but I admit that I have shared in the grave doubt my Lord has expressed.

Solicitor for applicant: *J. H. M'Cann.*
Solicitors for the Local Government Board: *T. T. Mecredy & Son.*
Solicitor for the District Council: *P. Tallan.*

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NICHOLAS F. COPPINGER AND FRANCIS DILLON M'DONNELL *v.* PATRICK R. NORTON (1).

(1901. No. 6048.)

Practice—Pleading—Ejectment—Possession—Estoppel—Ord. XXI., Rule 21.

To an action of ejectment on title upon the expiration of a lease the defendant pleaded a simple plea of possession, in accordance with Order XXI., Rule 21. The plaintiffs, in their reply, pleaded that in the event of the defendant seeking to contend at the trial that the lands were subject to the provisions of the Land Acts, he would be estopped from so contending by reason of certain proceedings and orders in the Land Commission Court:—

Held (Wright, J., *dissentiente*), that this reply should be struck out as embarrassing, and tending to force the defendant, in violation of his privileges under Order XXI., Rule 21, to reveal his case in a special rejoinder, but that leave should be given to the plaintiffs, if so desiring, to amend their statement of claim.

MOTION by the defendant to strike out a paragraph in the plaintiff's reply. The action was to recover possession of the lands of Tervey, in the county of Dublin, and for arrears of rent and mesne rates. The statement of claim recited a lease of the 5th August, 1858, between Baron Trimlestown and James Fegan, demising the lands of Tervey, containing 486 statute acres for the life of Prince Alfred, Duke of Edinburgh, subject to the yearly rent of £576. The lease expired on the death of Prince Alfred on the 30th July, 1900. Prior to, and at the expiration of the lease, all the estate and interest of the lessee became vested in the defendant, who paid the rent thereunder to the plaintiff, and all the estate and interest of the lessor became vested in the plaintiffs, who were the owners of the reversion expectant on the determination of the lease. The defence was a simple plea of possession. The plaintiff's reply, in addition to joining issue, contained the following paragraph, which was objected to:—"By way of further reply and in the event of the defendant seeking to contend at the trial of this action that the lands and premises mentioned in the

(1) Before KENNY, BARTON, and WRIGHT, JJ.

statement of claim are subject to the provisions of the Land Law (Ireland) Acts, 1881 to 1896, the plaintiffs say (but without prejudice to their right to object that such contention constitutes no defence to this action, and in any event is not open on the pleadings), that the defendant ought not to be admitted so to contend, first, by reason of the originating notices served by him to have a fair rent fixed and dated, respectively, the 18th October, 1887, and 16th October, 1896; and, secondly, by reason of the orders made thereon and the proceedings had thereunder."

It was sought to have this paragraph in the reply struck out as irregular on the grounds that it tended to prejudice and embarrass the fair trial of the action, and disclosed no reasonable reply to the defence, and was uncertain, and ambiguous, and unnecessary.

The plaintiffs, on the hearing of the motion, did not insist in retaining the portion of their reply within brackets.

Healy, K.C. (with him *A. C. Meredith*), for the defendant:—

The plea of possession is equivalent to the old plea of "not guilty." In ejectment estoppel cannot be replied to a plea of "not guilty:" *The Duchess of Kingston's Case* (1); *Lichfield* v. *Reidy* (2); *Wilkinson* v. *Kirby* (3); *Armstrong* v. *Norton* (4). All that the defendant is bound to plead is that he is in possession; he is entitled to withhold until the trial the case that he is about to make at the trial, and this is an attempt on the part of the plaintiffs to force him to disclose his case and put upon him a burden that he is not bound to carry. If the plaintiffs wanted to plead these matters they should have done so in their statement of claim. The rule that estoppel must be specially pleaded only applies where the party who omitted to plead the estoppel has an opportunity of pleading it: Everest and Stroud on Estoppel, p. 395.

This is not a pleading; a pleading must raise some question of law or fact. This is nothing more than a mere notice or submission. It is a kind of contingent pleading. There is no authority and no precedent for putting a contingent pleading of this kind on the file: *Stokes* v. *Grant* (5).

(1) Smith's Leading Cases, vol. ii., p. 751.
(2) 5 Exch. 939.
(3) 15 C. B. 430.
(4) 2 Ir. L. R. 96.
(5) 4 C. P. D. 25.

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Chaytor (with him *Wakely, K.C.*), for the plaintiffs:—

The plaintiff was bound to raise this question on the pleadings under Order XIX., Rule 16: Everest and Stroud on Estoppel, 392. A plea of possession places the defendant in the same position as he would occupy if he had pleaded expressly that the holding was one to which the Land Acts applied. If the defendant had put in a plea in express terms that the holding was one to which the Land Acts applied the plaintiff would have been bound to put in a plea of estoppel.

[The following cases were also referred to:—*Westropp* v. *Elligott* (1); *Tompkinson* v. *The South-Eastern Railway Company* (2); *Hall* v. *Eve* (3); *Hemphill* v. *Frazer* (4); *Edevain* v. *Cohen* (5); *Vooght* v. *Winch* (6).]

Meredith, in reply:—

If the plaintiff had raised the estoppel in the statement of claim every answer to it would have been raised by a plea of possession, but being pleaded in the reply the defendant is bound to show his hand because a mere joinder of issue would only mean "no such record": Bullen & Leake, 1868, Ed. p. 628. Thus the defendant is debarred from raising any defence other than "no such record" without disclosing his case by a special rejoinder which will defeat his rights under Order XXI., Rule 21.

The plaintiffs, having got an inkling of the case open to the defendant on his defence, might have amended their statement of claim under G. O. XXVIII., Rule 2.

WRIGHT, J.:—

As I have the misfortune to differ from my colleagues, I shall state my views separately. The action is brought to recover possession of certain lands, and the title of the plaintiff is shortly set out in the statement of claim. It sets out a lease of the 5th August, 1858, demising certain lands for a life that came to an end on the 30th July, 1900. It avers that prior to the expiration of the lease the reversion expectant on that lease became vested in

(1) 14 L. R. Ir. 319; 9 A. C. 815.
(2) 57 L. T. (N. S.) 358.
(3) 4 Ch. D. 341.
(4) 10 L. R. Ir. 87.
(5) 43 Ch. D. 187.
(6) 2 B. & Ald. 662.

the plaintiff, and that the lessee's interest became vested in the defendant, that the lease expired on the death of Prince Alfred, and accordingly the plaintiff claims to recover possession of the lands. The defence that has been put in is a defence of possession. It has been very carefully confined to the one plea of possession pure and simple. To that the plaintiff has delivered a reply, and in that reply he has joined issue generally upon the statement of defence, and has also pleaded a special reply which, as his counsel has stated, is in the nature of an estoppel, and the defendant now applies to set aside this special reply. There had been two proceedings at least before the Land Commission between the parties to the present litigation. One was an application on an originating notice of October, 1887, to have a fair rent fixed, on which an order had been made dismissing it on the ground that portion of the lands was demesne. Secondly, the reply relies upon a second originating notice dated the 16th October, 1896, to have a fair rent fixed served after, and in consequence of the passing of, the Land Act, 1896, upon the grounds that the portion of the land that was found to be demesne was not a substantial portion of the holding, and might be separated from the rest of the holding without injury to the landlord's interest, and a fair rent fixed on the remainder. An order was also made dismissing that originating notice. The special reply accordingly sets out or relies upon these two matters, that at two different stages the defendant, or the person then representing the defendant, sought to bring himself within the Land Acts to have a fair rent fixed, in other words to have it declared that he was tenant of an agricultural or pastoral holding, and that upon the expiration of his lease under section 21 of the Act of 1881 he would be deemed to be a tenant of a present tenancy from year to year. The reply is somewhat peculiarly worded, and might, I think, have been expressed in a clearer form, but it has not been assailed on this ground. What we have to consider is, whether the defendant is in any way embarrassed by it. Upon the plea of possession every legal defence is open. The defendant is not bound to specify what those legal defences are, and the plaintiff, by his reply, says that one of those legal defences is closed against him by reason of the result of the previous litigation. In other words, that he is

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estopped from raising that defence by a judgment of a competent Court having jurisdiction over the subject matter declaring that the holding is one outside the Land Acts, and that so far as that defence goes he cannot rely upon it. The defendant attacks the reply on the ground that he is embarrassed by it, and is at a disadvantage because it will force him to file a special rejoinder, or, as his counsel phrased it, will compel him to show his hand. I do not think there is much in that contention, or anything at all. These parties have been litigating as to the character of this holding for half a dozen years. Each side knows the strength and weakness of his own case perfectly well, and knows almost, if not quite as well, the strength and weakness of his adversary's case. Plaintiff's counsel say that they are bound by the rules of pleading to raise this issue if they intend to rely upon it. I think they are bound to put it forward in some shape or form, for otherwise a complaint may be made at the trial that this estoppel had not been pleaded. General Order XIX., Rule 4, has been referred to. It provides that "every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively." Rule 16 of the same General Order XIX. was also referred to, and it was contended that the plaintiff, if he relied upon the effect of these orders of the Court of Appeal and the Land Commission, was bound at some stage to set them out in his pleading. The rule is as follows:—"The defendant or the plaintiff, as the case may be, must raise by his pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds." In my opinion, according to the language and spirit of that rule, the plaintiff, if he seeks to rely upon these orders as a decision of a Court of competent juris-

diction determining the character of the holding, and estopping the defendant from setting up a particular defence, is bound to put it forward in his pleading.

During the argument it was conceded that the plaintiff was bound to put it forward, but it was contended that it should be in the statement of claim, and while the defendant admitted that he would not be in the slightest degree embarrassed if it were put forward in the statement of claim, he says he is embarrassed when it is put forward in the reply. I think the rule of pleading is very shortly stated at p. 192 of the first volume of Roscoe's Nisi Prius, last edition :—"The judgment is conclusive (*i.e.* an estoppel), if pleaded, where there is an opportunity of pleading it; but where there is no such opportunity, then it is conclusive as evidence; but if the party forbear to rely upon an estoppel, when he may plead it, he is to be taken to waive the estoppel, and to leave the prior judgments as evidence only for the jury." That was the danger that lay before plaintiff's counsel, namely, that if they did not raise it by their pleadings they would be asked at the trial why they did not do so, and therefore the question in the end is narrowed down to this—Should this have been stated in the statement of claim originally, or was it open to the plaintiff to state it in his reply? I take it that the meaning of the pleading is that the proceedings in the Land Commission were substantially proceeedings between the parties who are now before the Court, that the question between those parties was tried out and decided by a Court of competent jurisdiction, and the decision of that Court is binding upon the parties now before this Court. And to prove or substantiate this estoppel by matter of record the plaintiff will have to prove all those matters, and if it appears upon production of the documents that they related to a different subject-matter, or that the proceedings were not between the same parties, or those deriving through them, then those documents are of no avail, and there is no estoppel.

But it is contended by defendant's counsel that this special reply will compel them to plead a special rejoinder. I have already pointed out that there is no substance in this contention, even if they are right in so contending, but in my opinion they are not. They will have to do nothing of the kind. A mere

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formal joinder of issue would be sufficient, and automatic joinder of issue would put in issue every allegation in this reply. Order XXIII., Rule 2, provides, "No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of the Court or a Judge, and then shall be pleaded only upon such terms as the Court or judge shall think fit." And General Order XXVII., Rule 13, provides, "If the plaintiff does not deliver a reply, or any party does not deliver any subsequent pleading within the period allowed for that purpose, the pleading shall be deemed to be closed at the expiration of that period, and all the material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue." In my opinion at the end of four days under Order XXIII., Rule 3, the defendant would without filing any further pleading have put in issue every material statement of fact.

Mr. Meredith, for the defendant, went back to the old law, and referred to Bullen & Leake (Ed. 1868), at p. 628, where it is stated, "On a plea of judgment recovered for the same cause of action the matter of record is the only thing which can be directly put in issue. If the judgment were recovered for another cause, there must be a new assignment," and he says that he will be compelled to say something more than the magic word "possession." Following that passage I find, "A replication is sometimes pleaded in the form of a traverse, that the judgment was not in respect of the same causes of action as in the declaration mentioned," and a number of cases are referred to.

To summarise, I am of opinion that this estoppel should be pleaded, that it was absolutely immaterial whether it was put forward by reply or statement of claim, that no special rejoinder is necessary, and that the defendant is not in the slightest degree embarrassed. At the expiration of four days, without any action on his part, he has put the plaintiff upon proof of every material allegation in the reply.

So far as my judgment goes the motion ought to be refused.

BARTON, J. :—

This is a motion on behalf of the defendant to set aside the second paragraph of the plaintiffs' reply. It appears from the

statement of claim that the action is one of ejectment on the title brought to recover possession of a large holding of nearly 500 acres of land in the county of Dublin, on the expiration of a lease for lives, dated August 5th, 1858, between Lord Trimlestown and one James Fagan, which expired on the 30th July, 1900, on the death of the late Duke of Edinburgh.

The defendant filed a simple plea of possession in accordance with Order XXI., Rule 21. To this defence the plaintiffs, on the 28th October, 1901, delivered the reply which is the subject of this motion. In this reply the plaintiffs first join issue, and then in the second paragraph they plead the following special reply:—

"2. By way of further reply, and in the event of the defendant seeking to contend at the trial of this action that the lands and premises mentioned in the statement of claim are subject to the provisions of the Land Law (Ireland) Acts, 1881 to 1896, the plaintiffs say (but without prejudice to their right to object that such contention constitutes no defence to this action, and in any event is not open upon the pleadings) that the defendant ought not to be admitted to so contend, first, by reason of the originating notices served by him to have a fair rent fixed and dated respectively the 18th October, 1889, and 16th October, 1896; and, secondly, by reason of the orders made thereon, and proceedings had thereunder."

This plea was objected to on some formal grounds, which do not form the ground of my decision. It was urged that this is not a good plea of estoppel, and that a contingent plea of this kind is unprecedented and unauthorised by the rules and practice of pleadings. Certainly it is not drawn on familiar lines, and I heard no precedent adduced in support of this particular form of contingent plea of estoppel. But I prefer to decide this application on the real question of principle, which has been raised here, and not on any mere questions of form.

The real ground upon which this plea is impeached, and upon which I think it ought to be set aside, is this—that it violates Order XXI., Rule 21, of the rules under the Judicature Act, and would, if allowed to remain on the file, deprive the defendant of the protection which that rule was intended to afford him. The rule is as follows—the words marked in italics were added when

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the rule was amended in 1891 :—"No defendant in an action for the recovery of lands *upon the title*, who is in possession by himself or his tenant, need plead his title unless his defence depends upon an equitable estate or right, or he claims relief on any equitable ground against any right or title asserted by the plaintiff. But except in the cases hereinbefore mentioned it shall be sufficient to state, by way of defence, that he is so in possession, *and it shall be taken to be implied in such statement that he denies, or does not admit, the allegations of fact contained in the plaintiff's statement of claim.* He may, nevertheless, rely upon any ground of defence which he can prove, except as hereinbefore mentioned."

This is the rule as it stands in our present rules of 1891. I think it may be useful to note that in the former rule, General Order XVIII., Rule 8 (see Eiffe's Judicature Act, p. 319), the words in italics did not occur. The words "on the title" appear to have been added in consequence of the decision of the Court of Appeal in *Barnes* v. *Barnes* (1), and Morris, C.J., in *Hewson* v. *Coffey* (2), which were to the effect that this rule, which was copied from the English rules, only applied to actions of ejectment on the title, and not to actions of ejectment for non-payment of rent, which are peculiar to Ireland, and were not contemplated by the English rule. Accordingly I agree with counsel for the plaintiff, that the general rules of pleading apply to actions of ejectment for non-payment of rent. But this special rule, in my opinion, makes ejectments on the title an exception to the general rules of pleading, which, so far as they are inconsistent with this Rule 21 of Order XXI., do not apply to such actions.

The other words, which were not in the earlier rules, are the words, "and it shall be taken to be implied in such statement that he denies, or does not admit, the allegations of fact contained in the statement of claim." They are apparently added, in consequence of the decision of the House of Lords, in *Danford* v. *M'Anulty* (3). Indeed they practically embody the marginal note of that case, which is a case of the highest authority, and is the leading case on this rule. In my opinion, the judgments of the Lords in that

(1) 8 L. R. Ir. 165. (2) 15 I. L. T. R. 54. (3) 8 A. C. 456.

case, and especially that of Lord Fitz Gerald, make it clear that, as a matter of principle, this reply is a violation of the rule, and cannot be supported.

I quote from Lord Fitz Gerald's judgment at page 465:— "The obvious intention of this exceptional rule, if we are to construe it by its own light alone, seems to be to leave the defendant in an action for the recovery of land in the same position substantially as he was before the Judicature Act and rules, that is to say entitled to rely on his possession as a sufficient denial of the plaintiff's title, and a sufficient answer until the plaintiff had proved his title, and then enabling the defendant to rely on any defence he could prove, although he had not pleaded it. There is, in substance, no pleading in such an action after the statement of claim, unless it arises *puis darrein continuance*. The defendant is not obliged to plead in the proper sense. He puts in a statutable defence: 'I am in possession,' and *the plaintiff can do nothing but take issue on it, and proceed to trial.*" Lord Fitz Gerald was the only member of the Court who referred directly to the reply to a plea of possession, but all the other judgments are to the same effect, and this passage in his judgment is very high authority for the proposition, that to a simple plea of possession, filed under this rule in an action of ejectment on the title, the landlord must join issue, and cannot reply specially.

As to the modern practice in England, I have looked at the last edition of Mr. Odger's book on Pleading, at p. 213. The author seems to disapprove of this rule on several grounds, one of them being that on a plea of possession under the rule "the plaintiff must join issue." In Ireland ejectments on the title of this kind have become less usual than in former times in consequence of the Land Acts. Some fifteen years ago they were more common, and, according to my recollection of the practice at that time, when a plea of possession was the only defence pleaded by the defendant, the plaintiff replied by a simple joinder of issue. But apart from practice or authority it would seem to be almost a necessary corollary of this rule that if the defendant takes advantage of it, and files a simple plea of possession, the plaintiff can only join issue on that plea; otherwise the defendant

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might in every case be forced to do in a rejoinder what the rule says he need not do in his defence. In the present case the point may be one of substance and not a mere technicality, because it was suggested in the course of the argument that a motion under Order XXV., Rules 2 and 3, to dismiss the action on the point of law raised by the plea was in the plaintiffs' contemplation; and, whether that be so or not, plaintiffs' counsel stated that if this matter of the estoppel were decided in their favour, it would dispose of the whole action. Order XXI., Rule 21, is intended for the protection of the defendant, and it seems a *reductio ad absurdum* of the rule, if, in spite of it, the defendant can be forced to plead specifically in a rejoinder to allegations which, if established, will, according to the plaintiff's contention, conclude the case in his (plaintiff's) favour.

Mr. Meredith went further, and argued that in every case of ejectment on the title of agricultural or pastoral lands in Ireland it is essential to the landlord's title to establish that the holding is excluded from the Land Acts, and that therefore the plaintiff must so plead in his statement of claim. In the case of *Westropp* v. *Elligott* (1) the plaintiff adopted this as his mode of pleading, and stated in his statement of claim the material facts on which he relied as bringing the holding within the exception of lands let wholly or mainly for the purpose of pasture (2). There is much force in the contention that the fact that the holding is excluded from the Land Acts is a necessary link in the chain of the landlord's title, and ought to be pleaded, and proved in evidence, as such. However, the point was not argued on the other side, and is not necessary for our decision, and I leave it with the observation that it seems to me to be well worthy of consideration.

The only remaining argument, that was urged for the plaintiff, was founded on the necessity of pleading this estoppel. I quite agree that the plaintiff would be taking a risk if he did not plead an estoppel in this case. But I think that there is a simple answer to this argument. The plaintiff, if he wished to plead an estoppel as part of his title, might and ought to have pleaded it in his statement of claim; and if he wishes now to amend his

(1) 14 L. R. Ir. 319. (2) 9 A. C. at p. 816.

statement of claim, we are quite ready to allow him to do so. But his counsel candidly admit that this is not what they want. What they want is to circumvent Order XXI., Rule 21. If they plead this estoppel in the statement of claim, it will be covered by the defendant's plea of possession under that rule. They admit that they wish "to drive the defendant out of his entrenchments," and force him to plead to their special reply by joinder of issue or special plea—the very thing which the rule protects him from. If this contingent replication is allowable, such replications might be multiplied indefinitely. Every possible defence might be anticipated and raised by a contingent reply, and the defendant would be forced to join issue or plead specially to each and all of them. It seems to me that the more this replication is considered, the more evident it becomes that it is an ingenious attempt to indirectly nullify and destroy the operation of Order XXI., Rule 21.

There is no suggestion of surprise, or of matter arising pending the action, in this case. It appears from the correspondence that both parties knew, before the action began, that this question of estoppel by record would be the main controversy between the parties. The plaintiff might have pleaded it in his statement of claim. By amendment he can do so now. But he cannot, in my opinion, raise it by this special replication, which must be set aside as violating Order XXI., Rule 21, depriving the defendant of its protection, and thereby embarrassing and prejudicing the fair trial of the action.

KENNY, J.:—

The point for decision in this case is one of novelty, and in the view I take is also one both of principle and of substance. If this were a personal action, there can be no doubt, I think, that if the defendant set up in his pleading a defence which his adversary considered he was estopped from relying on, the estoppel should be specially replied, even if such reply should entail the necessity for a special rejoinder. Order XIX., Rule 16, expressly declares that the parties must, by their pleadings, raise all such grounds of defence or reply, as the case may be, as, if not raised, would be likely to take the opposite party by surprise,

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or would raise issues of fact not arising out of the preceding pleadings. A number of illustrations—not necessarily exhaustive—are there given of matters coming within the rule, viz. fraud, Statute of Limitations, release, payment, performance, facts showing illegality, either by statute or common law, or the Statute of Frauds. Estoppel is not mentioned; but I would have no hesitation in holding that it came within the rule. It has been suggested that this rule does not apply to the case of a reply other than one in answer to a counterclaim, but I cannot assent to such an argument. The word "reply" is used in the most unrestricted way, and *Hall* v. *Eve* (1), in the Court of Appeal in England, decides that a plaintiff can, by his reply, confess and avoid.

But the novel character of the present reply is that it is pleaded in an action on the title for the recovery of land. There is no defence on the files of the Court to which it purports to be an answer. The defendant has in his pleading confined himself to the one statutory defence—that he is in possession of the lands sought to be recovered. The allowance of that defence is an express exception from the provisions of Order XIX., Rule 16, to which I have already referred, and is a very clear indication that a great distinction was drawn by the framers of the rules between personal actions and those for the recovery of land. In the one case, all defences must be put forward, which, if unpleaded, would be likely to take the opposite party by surprise. In the other case, Order XXI., Rule 21, enables a defendant under the plea of "in possession" to avail himself of all defences—save such as depend on an equitable estate or right—to defeat the plaintiff's claim. He need not plead his title. The defence puts the plaintiff on proof of every allegation in the statement of claim, and finally the defendant may rely on any ground of defence which he can prove, so long as it is not the mere assertion of an equitable estate or right. The General Order gives this favoured litigant all those very exceptional privileges; and no one but those who have had the conduct for plaintiffs of complicated actions of ejectment on the title can fully appreciate the great advantage which they

(1) 4 Ch. D. 341.

confer, or the anxiety and surprise which they often give rise to amongst those who have to speculate upon the nature of a defendant's case. Having these privileges, a defendant is entitled to say that until the trial of the action he has a right to maintain absolute secrecy as to the nature of his case, and to withhold every scrap of information which might anticipate his proofs. That being so, I am of opinion that if we allowed this reply to stand, we might be depriving the defendant of that absolute right. Indeed, I think we inevitably would. For defendant's counsel have pointed out the extreme baldness of the plea of estoppel, and have suggested a number of possible matters, which, as advisers of the defendant, they say it would be essential for them to embody in a very special rejoinder. If that be so, and I cannot doubt that it is, the reply has the effect of forcing the defendant's hand, so far as his defences are concerned, and, in my opinion, is in direct violation of the spirit of Order XXI., Rule 21.

I have never hitherto seen a reply framed like the present. Its great peculiarity is that it assumes the defendant will rely on a particular character of defence, and then proceeds to show why he should not be allowed to do so. If such a reply in ejectment were allowed, I see nothing to prevent a plaintiff singling out each possible defence that occurs to him, and setting up some vague reply that would involve a special rejoinder, and consequent disclosure of portion at least of the defendant's case.

I, therefore, think that the reply is embarrassing, so far as it sets up an estoppel; but if the plaintiffs are advised that, notwithstanding the authorities that have been referred to as establishing that estoppel may be given in evidence without plea in cases where there was no opportunity for pleading it, it would be unsafe for them to go to trial without raising the question, we shall be prepared to give leave to amend the statement of claim as plaintiffs may be advised.

Solicitors for the plaintiffs: *Stanuell & Son.*
Solicitors for the defendant: *O'Hagan & Son.*

J. L.

K. B. Div.
Probate.
1901.

July 21.
Nov. 11.

WOLFE *v.* WOLFE (1).

(1901. No. 12.)

Practice—Probate—Document partly testamentary admitted to probate.

Where a document, duly executed as a will, is partly testamentary and partly not testamentary, the Court has jurisdiction to admit the testamentary part of the document to probate.

TRIAL OF ACTION.

This action was brought by the plaintiff, Elizabeth Wolfe, to establish a document dated March 13, 1899, as the will of her late husband, William Wolfe, deceased.

The defendants were James Wolfe, a son, and one of the next-of-kin of the deceased, and William Wolfe, the eldest son of the defendant, James Wolfe.

The action was tried at the Cork Assizes in July, 1901, and judgment was reserved, and delivered in Dublin on November 11, 1901. The facts of the case and the authorities are stated in the judgment.

P. D. Fleming, for the plaintiff.

A. M. Sullivan, for the defendant, James Wolfe.

Sheehan, for the defendant, William Wolfe.

Nov. 11.

ANDREWS, J.:—

This was an action by Elizabeth Wolfe (the widow of William Wolfe, deceased), who claimed to be a legatee under a document dated the 13th of March, 1899, to establish it as his will. The defendant, James Wolfe, is a son, and one of the next-of-kin of the deceased, and the other defendant, William Wolfe, is James Wolfe's eldest son.

(1) Before ANDREWS, J.

Administration, with this document annexed, as a will, was granted to the widow from the Cork District Registry, in common form, on the 15th of October, 1900. By an order made by me on the 14th of January, 1901, this administration was recalled, as having been obtained without argument, and by surprise, and without notice to the interested parties.

The present probate action was afterwards commenced on the 22nd of February last, propounding this document for proof as a will, and by an order of the 1st of July last the action was, at the request of the parties, and to save expense, directed to be tried at Cork.

The trial was had before me at Cork, accordingly, without a jury, and it was proved that the propounded document was duly executed as a will, and the testamentary capacity of the deceased, and his knowledge and approval of its contents, were fully established. The real question in the action was whether the document propounded was of a testamentary character entitling it to be admitted to proof as a will in whole or in part.

This document is in the following terms:—

"I hereby bequeath my farm at Clogagh with the goods and chattels thereon to my grandson William Wolfe (my son James' eldest son), and I give up the management of the farm from this date to my son James, he on his part guaranteeing to allow to me and to my wife the sum of £20 per annum during both our lives; and in case my wife should survive me half that sum to her during her life. My son James becomes responsible for payment of rent and taxes on the farm. My son James also agrees to allow my widow the grass of a milch cow for use of the house, and a potato garden. My son James also agrees to become security for payment of the sum of £50 to Mrs. Wolfe in the event of her surviving her husband.

"Signed this 13th day of March, 1899, by me, William Wolfe, and by my son James, in presence of us who were present at same time.

"WILLIAM WOLFE.
"JAMES WOLFE."

"WILLIAM WOLFE.
"FRED. G. WALKER, CLK."

The William Wolfe who was one of the witnesses to the execution of this document was the eldest son of the deceased. The other witness was his clergyman, the Rev. Frederick G. Walker, and both were examined at the trial.

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Andrews, J.

It appeared from the evidence of Elizabeth Wolfe, who was the second wife of the deceased, and was married to him in 1893, that some years after their marriage he told her he wished to settle his affairs, and that he was going to Bandon to make his will. He went there, but returned without making it. On two subsequent occasions he spoke to his wife about settling his affairs and making his will, and, on the second occasion, which was on the 8th of March, 1899, he told her to write for his son James, which she then did. The deceased had taken ill in the previous January, and was confined to his bed. He knew in March (as was proved by Mr. Walker) that his illness was a dangerous one, and he did not expect to recover from it. His mental capacity, however, continued good, and he survived until the 10th of June, 1899.

James Wolfe came soon after he was written to, and saw his father, who afterwards told his wife "that he was willing the place to his grandson, Willy."

The deceased's son, William, also came soon afterwards; and on the 13th of March he was sent by the deceased for Mr. Walker, who lived near. Mr. Walker came on that day, and saw the deceased, who, as Mr. Walker stated, told him "he wished to make a disposition with regard to his interest in his farm." Mr. Walker urged the deceased to tell him his wishes, and allow him to call on Mr. Sherlock, a solicitor, in order that he might draw out a proper document. The deceased, however, insisted on its being done at once. He had paper, pen, and ink ready; and Mr. Walker said that he wrote down, as nearly as he could, what the deceased told him. This was then read over to the deceased, who appeared satisfied; and the writing was then duly executed, as a will requires to be executed, and was also signed by James Wolfe. This is the propounded document, which, with the approval of the deceased, was, when executed, taken and kept by Mr. Walker. Mr. Walker's impression was that the document was an agreement between the testator and his son, James, "to take effect then and there," but he said, "he was afraid he made a mess of it."

It appeared also from the evidence that the deceased told his wishes to Mr. Walker in the first instance, and, after having heard them, Mr. Walker wrote out the propounded document,

during the writing of which he and the deceased did not speak to one another. The deceased's son, William, stated in his evidence that, on the morning he went for Mr. Walker, the deceased told him "he intended to let him work the farm from that day forward, as he did not feel able to work it himself," and that he had asked William "to write an agreement between him and James." The deceased's son, James, stated in his evidence that he had managed the farm since his father took ill in January, and that he signed the propounded document and agreed to its terms, and that his father, during his illness, had several times mentioned to him, his grandson, William (who was his eldest grandson, and was in his seventeenth year), and had told James that he intended to leave his farm to this grandson.

The result of the entire evidence, including the terms of the propounded document, has satisfied me that on the 13th of March, 1899, the deceased had a distinct testamentary intention to leave his farm by will to his grandson, William; and that he intended that the bequest of it, in the propounded document, should take effect upon and only after his death; but that the remainder of the document was intended by him to embody a present arrangement to be agreed to by his son, James, and to take effect at once; and that he looked to his son, James, to give effect to it, in accordance with its terms, several of which, as clearly appears from the document, were to have immediate operation, and were not to be dependent on his death, and the remainder of which were capable of being presently agreed to. This action is not a proceeding in which I can decide upon, or properly offer an opinion respecting the legal effect of that portion of the propounded document which follows the bequest to the deceased's grandson, irrespective of testamentary character; but nothing in this judgment, or in my decree, is to be understood as indicating that, in my opinion, this portion of the document has no such legal effect.

A will has been described by Mr. Jarman (1) as "an instrument by which a person makes a disposition of his property, to take effect after his death, and which is, in its own nature, ambulatory and revocable during his life." That portion of the propounded

(1) Jar. Wills (Ed. 1893), p. 18.

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document, which consists of the bequest to the deceased's grandson, comes within this description. If it stood alone, the document having been duly executed as a will, no doubt could be entertained that it was the will of the deceased. It complies also with the two recognized tests of testamentary character, referred to by Warren, J., in the case of *In the Goods of Halpin* (1), that is to say it was revocable by the deceased during his lifetime, and he intended it not to take effect until his death, for, upon the evidence and the terms of the document itself, I think both these propositions with reference to it are clear. It would, in my opinion, be impossible to come to the conclusion that he intended the bequest to his grandson to be an immediate gift.

Now, where there is a disposition of a manifestly testamentary character in a document duly executed as a will, the Court ought, unless there is some decisive reason to the contrary, to admit it to proof as a testamentary act. Does then the fact that the remainder of this document is not of a testamentary character, but was manifestly intended to become operative immediately, and not to be dependent on the death of the maker of it, preclude the Court from admitting to proof that portion of the document which is clearly testamentary? It my opinion, it does not. I am not aware, however, of any express authority on this question. A like question was referred to by Lord Penzance in the case of *In the Goods of Robinson* (2), but it was not necessary for him to decide it. All he said upon it was: "The first difficulty that arises is, that the Court is asked to deal with a portion only of a document, and declare it to be testamentary. I have met with no case where that has been done, although I by no means say that it could not be done." In that case he held that the instrument in question was irrevocable in all its parts. In *Doe* d. *Cross* v. *Cross* (3), which was an ejectment, and the question arose upon a will of freehold lands, an instrument in the form of a power of attorney, given in 1840 by one Peter Cross in India, and sufficiently executed as a will, appointed his mother to receive the rents of his lands for her own use until he might return to England, or, in the event of his death,

(1) I. R. 8 Eq. 569. (2) L. R. 1 P. & D. 384. (3) 8 Q. B. 714.

he "thereby assigned and delivered to her the sole claim to his lands"; but her occupancy was to cease on his return. He died without returning, and this was unhesitatingly decided to be a good will of the lands in question, and the Court had no difficulty in holding, as it did, that there was no objection to one part of an instrument operating *in praesenti* as a deed, and another *in futuro* as a will.

There is, no doubt, however, that an instrument, or a separate and distinct part of an instrument, which takes effect *in praesenti*, and is not intended by the maker of it as a testamentary act, cannot be admitted to proof as a will. If authority be required for this, I may refer to the following passage in the judgment of Selborne, L.C., in *Whyte* v. *Pollock* (1):—"I lay it down that it is, in my judgment, a proposition universally true that nothing can receive probate which was not intended to be a testamentary act by the testator." But I see no reason why a distinct part which is clearly testamentary of an instrument should be excluded from proof as such, because the remainder, or another part of it, is not testamentary. Why should a person be unable to make a will on the same sheet of paper on which he enters into any other arrangement respecting his property not amounting to a complete disposition of it? In so far as such an arrangement may bind his property, the testamentary disposition would be subject thereto; and, in the present case, it may be that the bequest to the deceased's grandson is subject to the provisions in the remainder of the document; but this is not an action in which that question can be determined.

The following questions, however, arise for necessary decision in this action, and I accordingly decide, first, that so much of the propounded document as consists of the bequest to the grandson of the deceased, and is in the following words:—"I hereby bequeath my farm at Clogagh with the goods and chattels thereon to my grandson William Wolfe (my son James's eldest son)" is testamentary, and ought to be admitted to proof as such; and, next, that the remainder of the propounded document is not testamentary, and ought not to be admitted to proof as part of the deceased's will.

(1) 7 App. Cas. at p. 405.

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Both the plaintiff and the defendants will have their costs of this action out of the assets of the deceased.

I shall, in my decree, set out the whole of the propounded document, specifying the portion to be admitted to proof, as the testator's will, and the propounded document will, of course, be deposited among the records.

I have only to add that I do not regard this case as one in which the Court has to determine a question of the incorporation in a will of another document, or in which the settled principles with reference to incorporation are applicable.

Solicitor for the plaintiff: *George K. Sherlock.*
Solicitor for the defendants: *J. B. Deane.*

W. L.

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THE QUEEN (CROWLEY) *v.* THE JUSTICES OF WEST CORK (1).

THE QUEEN (M'INTYRE) *v.* THE JUSTICES OF COUNTY DONEGAL (1)

Licensing (Ireland) Act, 1833 (3 & 4 *Wm.* 4, c. 68), *ss.* 2, 4, *and* 5—*Publican's licence—Application at Quarter Sessions—Justices equally divided—Mandamus.*

On an application to Quarter Sessions for a publican's licence, which was opposed, the Justices, after hearing evidence on behalf of the applicant and of the objector, made an order reciting that the Justices were equally divided, and rejecting the application:—

Held, that the order was bad, not only for not stating the grounds of the refusal of the application, but also because the Justices being equally divided had not adjudicated on the question before them, and that therefore a writ of mandamus should issue to the Justices to hear and determine the application.

On a similar application the order purported to be made by the Justices was—"Bench equally divided. No rule." The applicant now sought for a

(1) Before ANDREWS and JOHNSON, JJ.

writ of mandamus to the Justices to hear and determine the application, and also for a writ of mandamus to the Clerk of the Peace to issue the certificate mentioned in sect. 5 of 3 & 4 Wm. c. 68:—

Held, he was entitled to the former writ, but not to the latter.

THESE were applications to make absolute Conditional Orders for writs of certiorari and mandamus.

REG. (CROWLEY) *v.* THE JUSTICES OF WEST CORK.

Ellen Crowley was an applicant for a seven-day licence for the sale of beer, cider, and spirits, by retail, to be consumed on the premises—she not having been licensed in the preceding year. The necessary notices had been duly served and published, and the case came on for hearing at the Annual Licensing Sessions held at Skibbereen. The District Inspector of Constabulary objected on all the statutory grounds of the unfitness of the applicant, the unsuitability of the premises, and the number of previously licensed houses in the neighbourhood. On the hearing the Justices were equally divided in opinion, and an order was made rejecting the application. The material portion of the order was as follows:—"An application was made by the above-named applicant, Ellen Crowley, for a new seven-day licence. Whereupon, upon hearing the said application, and the objections raised by the constabulary, a division of the Justices assembled at the said sessions was taken, when twelve Justices voted for and twelve Justices against. Whereupon an order was made by the Court rejecting the said application."

The applicant obtained from the Queen's Bench Division a Conditional Order for a writ of certiorari to remove and quash all orders and adjudications respecting the application, and for a writ of mandamus commanding the Justices to enter continuances and to re-hear and determine the application on the grounds (as to the certiorari) that the said orders and adjudications were made without, and in excess of, jurisdiction; that the Justices being equally divided, they had no authority to refuse but were bound to grant the application; and that the order was bad on its face for not stating the grounds of such refusal.

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Ronan, K.C., and *Sheehan*, for the applicant:—

Where the magistrates are equally divided, the applicant is entitled to a licence. The general impression that a licence is affirmatively granted by the magistrates is erroneous. In England, indeed, under the statutory provisions in force there (9 Geo. 4, c. 61, ss. 9 and 17), an actual licence must be granted by the magistrates, and signed by the majority of them, as a condition precedent to obtaining the Excise licence; but the scheme of the Irish statute (3 & 4 Wm. 4, c. 68) is wholly different: the true construction of sections 2, 3, and 4 of that Act is that the applicant is to give publicity to the fact that he is about to make an application for a licence, so as to enable certain persons to raise objections; if any of these objections are established the Justices are to prohibit the licence. The power of the Justices is prohibitory merely, not affirmative: 6 Bac. Ab. 644; *Young* v. *Wright*(1); *Reg.* (*Gilbey*) v. *The Justices of Fermanagh*(2), *per* O'Brien, J.; *Reg.* (*Marshall*) v. *The Justices of Tyrone* (3), *per* O'Brien, J. This construction is confirmed by a comparison of sections 9 & 10 of 17 & 18 Vict. c. 89. The Clerk of the Peace is bound to issue the certificate, mentioned in sect. 5 of 3 & & 4 Wm. 4, c. 68, to any applicant to whom the Justices have not prohibited a licence to issue; the giving of such certificate is not an act of the Justices, but a ministerial act of the Clerk of the Peace. The magistrates being equally divided should have made no rule on the objection: *Reg.* v. *O'Connell* (4); *Reg.* v. *Belton* (5), *per* Lord Denman, C. J. The order here is, at all events, bad for not stating the grounds of refusal: *Reg.* v. *Sykes* (6).

Morphy, for the objector below:—

I admit that the order is bad for not stating the grounds of refusal, and I cannot resist the application for a mandamus in so far as sought for on this ground.

(1) Sid. 6.
(2) [1897] 2 I. R. 559, 568.
(3) [1896] 2 I. R. 15, 26.
(4) 20 L. R. Ir. 625.
(5) 11 Q. B. 379, 388.
(6) 1 Q. B. D. 55.

REG. (M'INTYRE) v. THE JUSTICES OF DONEGAL.

In this case James M'Intyre had applied for a similar licence to that sought in the last case, and the application was opposed on similar grounds. The material portion of the order made by the magistrates was—"Bench equally divided. No rule." The applicant obtained a Conditional Order for writs of certiorari and mandamus, as in Crowley's case, on the grounds (as to the certiorari) that the orders and adjudications in the premises were made without, and in excess of, jurisdiction; and that the Justices assembled, being equally divided, the Chairman and Justices had no authority to refuse, but were bound to grant the application; and also for a further writ of mandamus to the Clerk of the Peace for the county of Donegal, commanding him to issue the certificate mentioned in section 5 of the 3 & 4 Wm. 4, c. 68.

It appeared from the affidavit of the applicant, on which the Conditional Order was obtained, that at the conclusion of the evidence on the application a poll of the Justices was taken, when it was found that the Bench was equally divided: fifteen Justices voting in support of the application, and fifteen in support of the objection. That the County Court Judge, who did not vote then, stated that, in his opinion, the objection failed, and the licence should be granted. That subsequently he directed the Clerk of the Peace to enter "No rule on the application." In an affidavit subsequently made by two of the Justices it was stated that the Court was constituted of thirty-four magistrates, four of whom abstained from voting or declined to vote.

Henry, K.C. (with him *P. Law Smith*), for the applicant:—

Out of thirty-four magistrates on the Bench only fifteen voted against the application. The majority, therefore, must be taken as in favour of it. The County Court Judge, at all events, had no right to withdraw from the adjudication, being an essential part of the Court (25 Geo. 3, c. 25, ss. 2, 17), and as he did not vote in favour of the objection he must be considered as having been against it. [*Morphy.* I object to any evidence being gone into outside the order itself.] The power of the Justices is prohibitory merely: as to this, in addition to the cases cited by

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Mr. Ronan and Mr. Sheehan in the last case, see *Reg.* v. *Justices of Tyrone* (1). The proper order to have made would have been that the Justices were not satisfied of the truth and sufficiency of the objections. The only order to the Clerk of the Peace contemplated by the statute is an order of prohibition; in the absence of such order, the certificate mentioned in section 5 must be issued by him. The duty imposed on the Clerk of the Peace by that section is a public duty, and a mandamus will lie to compel him to issue such certificate: Shortt on Mandamus, 356; *R.* v. *Payn* (2). If such mandamus will not lie to the Clerk of the Peace directly, it will lie to the Justices commanding them to direct him to issue the certificate. Such direction may be given at a subsequent session, since the Court of Quarter Sessions is a continuous Court: *Keen* v. *Reg.* (3); *Rex* v. *Justices of Warwickshire* (4). [He also referred to *Stevenson* v. *O'Neill* (5).]

Morphy, for the objector below:—

The order of the Justices states that the Bench was equally divided; this Court cannot go behind that: *Rex.* v. *The Justices of Middlesex* (6); *Reg.* v. *The Justices of Monmouthshire* (7); *Rex* v. *The Justices of Leicestershire* (8); *Ex parte Evans* (9). A mandamus will not lie against an officer such as the Clerk of the Peace, at all events without evidence of demand and refusal.

Cur. adv. vult.

Jan. 29.

ANDREWS, J.:—

These two cases of *The Queen* (*Crowley*) v. *The Justices of West Cork*, and *The Queen* (*M'Intyre*) v. *The Justices of Donegal*, are in some material respects so similar that we acceded to the application which was made to us to hear the arguments in both cases before giving judgment.

(1) [1896] 2 I. R. 318.
(2) 6 A. & E. 392.
(3) 10 Q. B. 928.
(4) 2 A. & E. 768.
(5) I. R. 11 C. L. 134.
(6) 2 Q. B. D. 516.
(7) 4 B. & C. 844.
(8) 1 M. & S. 442.
(9) [1894] A. C. 16.

THE QUEEN (CROWLEY) *v.* THE JUSTICES OF WEST CORK.

In this case a Conditional Order was obtained for a writ of *certiorari* to bring up, for the purpose of being quashed, an order of the Justices made at the Annual Licensing Sessions held at Skibbereen on the 29th October, 1900, rejecting the application of the prosecutrix for a certificate to enable her to obtain a publican's retail licence, and for a writ of mandamus commanding the Justices to enter continuances and to re-hear and to hear and determine that application. I do not propose to go outside what appears on the face of the order, which is impeached, and which in substance is as follows: viz. upon hearing the said application and the objections raised by the constabulary, a division of the Justices assembled at the said sessions was taken, when twelve Justices voted for and twelve against; whereupon an order was made by the Court rejecting the said application.

It was contended that there are two fatal defects which make this order bad on its face:—*First*, that while reciting that the Justices were equally divided, an order, nevertheless, purports to have been made; *secondly*, that the reason or ground on which the application was rejected is not declared in the order as required by the statute (3 & 4 Wm. 4, c. 68, sect. 4). It was conceded by Mr. Morphy that the latter defect is fatal; so that it only remains for us to deal with the former, and we are of opinion that it is likewise fatal.

The statute which we have to consider is the Licensing Act of 1833 (3 & 4 Wm. 4, c. 68), the 2nd section of which provides that upon an application by a person not duly licensed in the preceding year (which is the present case), for a licence for the sale of beer, cider, or spirits, by retail, to be consumed on the premises, notice in writing, signed by the applicant and stating certain particulars, must be given to the persons specified in the section, and amongst others the Clerk of the Peace, upon whom the duty is imposed of making out a list of the applicants, containing certain specified particulars, and transmitting a copy of such list to certain specified persons. By the 3rd section the names of the applicants must be called aloud at the ensuing Quarter Sessions in open Court, and proclamation made of each application, and demand made whether

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any one has or knows of any objection to or why such application should not be allowed or licence granted.

The 4th section contains provisions enabling certain persons to make objection to the application on certain specified grounds, and the section then goes on to provide that "the Justices in such sessions assembled shall then, or at some other convenient time to be appointed, proceed to consider, examine into, *and adjudicate upon* the truth, sufficiency, and validity of such objection, . . . if such Justices shall be thereupon satisfied of the truth and sufficiency of such objection, and shall deem it improper to entrust the applicant with a licence, they shall, by order in writing, prohibit such licence to be issued, and therein declare the reason or ground of such prohibition."

This section, it will be observed, expressly provides for an *adjudication* by the Justices, which must be either in favour of the sufficiency of the objection, or (as is shown by section 5) against the objection and in favour of the application.

Section 5 provides that "upon each application being disposed of by the Justices attending at such sessions" the Clerk of the Peace, or his deputy, is required to give to the person entitled thereto a certificate in the form set forth in the section, certifying that he is entitled to receive the licence applied for. This, in my opinion, makes it manifest that the words "upon each application being disposed of," in the 5th section, must be construed as meaning disposed of in favour of the applicant, as it would be absurd to enact that the officer of the Court was to give the certificate if the Justices had prohibited the licence to be issued.

The effect, then, of sections 4 and 5 is, that there should be either a prohibition of the licence—in which case there is an end of the matter—or a disposal of the application in favour of the applicant, in which case the officer of the Court is required to give the certificate which entitles the applicant to the licence; and, in either case, there must be an adjudication by the Justices. It appears to me to be a self-evident proposition that no tribunal which is equally divided upon the question for its determination can adjudicate thereon. In this case the Justices had a duty imposed upon them by statute to adjudicate on the question before them, and they have not done so, and could not do so,

since there were as many satisfied as dissatisfied on the question. The statutory duty, therefore, remains unperformed, and what purports to be an order is shown on its face to be wholly invalid as an order. We, therefore, must make absolute the Conditional Order, so that the Justices may perform their statutory duty. Continuances must be entered. The hearing and determination of the application, for which a mandamus must go to the Justices, will not necessarily be by the same Justices. The Court consists of the particular Chairman and Justices who happen to sit and constitute it on any occasion; but it is one Court of Quarter Sessions, which may be duly constituted for the hearing and determination of the application in question by the Chairman and other Justices, or include other Justices than those who were equally divided in last October.

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The order of the Justices in this case is not identical with that made in *Crowley's Case*. As in that case, I do not propose in this one to go beyond what appears in the order itself, which shows that the Bench was equally divided, and that an order purporting to be "no rule" was made on the prosecutor's application. It is clear that there was no adjudication upon, nor determination of, the application of the prosecutor for a certificate to enable him to obtain an Excise licence for the sale of beer, cider, and spirits by retail to be consumed on the premises. In the case of *The King* v. *The Justices of Leicestershire* (1) the Court had to deal with a judgment of the Justices good on its face, and the Court declined to go into matter extraneous to the record in order to ascertain how that judgment was arrived at, but Lord Ellenborough in his judgment proceeded to say, "If no judgment had been pronounced the Court might have interposed, but here there is a judgment. The party who would have corrected the error should have applied to the proper forum and in due time; and if it had been found that the numbers were equal, nothing would have been done upon it, for it would have been a nullity."

(1) 1 M. & S. 442.

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In the present case the Justices have thought fit to enter "no rule," which appears as an order. In my opinion it is a nullity, and creates an embarrassment which cannot be allowed to remain. It must be quashed, continuances must be entered, and a mandamus granted, directed to the Justices, to hear and determine the application.

It was argued for the prosecutor that we should hold that the Justices were not satisfied as to the validity of the objection to the prosecutor's application, and that therefore a mandamus should go to the Clerk of the Peace to compel him to issue the certificate mentioned in the 5th section of the Act. Mr. Henry, in his clear argument, contended that there must be an affirmative finding by the Justices as to the sufficiency of the objection, otherwise the objection falls to the ground, and then there is nothing to interfere with the issue of the certificate. I think this argument fails at its foundation, because there must be an adjudication by the Justices, and being equally divided they did not and could not come to any decision either for or against the objection or the application; and, as in *Crowley's Case*, their statutory duty remains unperformed.

It is unnecessary for us to determine the question whether a mandamus to the Clerk of the Peace would ever go in such a case as this. Though named in the 5th section of the Act, and required thereby in a particular event to discharge a specified duty, he is merely the officer of the Court of Quarter Sessions, whose directions he is to obey. We have been unable to find any case, and the Registrar is not aware of any case, in which a mandamus ever went to a Clerk of the Peace, or any similar officer, in any similar case. It would certainly be not only novel, but highly inconvenient, if this Court were to undertake the supervision of the officers of Courts of inferior jurisdiction.

Our order in this case will be the same as our order in *Crowley's Case, mutatis mutandis.*

JOHNSON, J.:—

I agree in the reasons expressed by my learned brother Andrews for the judgment of the Court which he has pronounced. The gist of the arguments of Mr. Ronan and Mr. Henry on the point

which has been mainly pressed is, that if the Justices at Quarter Sessions do not by their order prohibit the issue of the Excise licence, the statute 3 & 4 Wm. 4, c. 68, s. 5, sets in motion the Clerk of the Peace, *virtute officii*, and imperatively imposes on him the duty of certifying that the applicant is "*duly entitled*" to receive the Excise licence. But an examination of the earlier provisions of the statute demonstrates that this is not so. Section 5 provides that "upon each application *being disposed of by the Justices* attending at such sessions, the Clerk of the Peace is to give or cause to be given *to the person entitled thereto*" a certificate in the form in the statute. This refers us back to the preceding section to ascertain how the application is to be "*disposed of by the Justices.*" Section 2 provides that the person who intends to apply for an Excise licence shall within the prescribed time before the next Quarter Sessions serve the specified notices on (amongst other persons) the Clerk of the Peace stating his intention to make such "*application*," and the Clerk of the Peace is to file the notice, and ten days at least before the Quarter Sessions make a list of the applicants, and transmit a copy of it to the specified persons.

Section 3 then provides that on and at the appointed day during the Quarter Sessions the names and places of abode of the several applicants shall be called aloud *in open Court by the officer of said Court* (*i.e.* by the Clerk of the Peace), and proclamation made whether anyone has or knows of any objection "*why such application should not be allowed or licence granted.*" This is then the subject-matter of consideration of the Justices, and the mode of procedure is provided by section 4, which empowers specified objectors to object on the specified grounds; and the "Justices shall then or at some other convenient time to be appointed, *proceed to consider, examine into, and adjudicate upon the truth, sufficiency and validity of such* objection, . . . and if satisfied of the truth and sufficiency of such objection . . . shall by order in writing to be duly entered by the Clerk of the Peace prohibit such licence to be issued, and therein declare the reason of such prohibition." When the Justices have discharged this duty imposed on them by the statute, and not before, the application "is disposed of by the Justices"; and until the Justices have *adjudicated* the application is not disposed of. The Clerk of the Peace is the ministerial officer of

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the Court to record and act under the orders of the Court. In the present cases it appears by the entries or records of the Court that no adjudication was made by the Justices—they arrived at no conclusion—a number of the Justices were, and an equal number of the Justices were not, satisfied of the truth and sufficiency of the objection, and the numbers being equal the application was not "disposed of by the Justices," and the Clerk of the Peace could not lawfully have given the required certificate, nor was the applicant in either case "entitled thereto."

Solicitor for the applicant, Ellen Crowley: *P. J. Collins.*
Solicitor for the applicant, James M'Intyre: *E. M'Fadden.*
Solicitor for the objectors: *Sir Patrick Coll.*

J. G. T.

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Feb. 25.

LOCAL GOVERMENT BOARD *v.* EIVERS (1).

Local Government (Ireland) Act, 1898 (61 & 62 *Vict. c.* 37)—*Local Government (Application of Enactments) Order of the* 22*nd December*, 1898, *Article* 12, *clauses* 4 (*e*) *and* 5 (*a*)—*Councillor—Disqualification—Person "concerned in any bargain or contract"—Person "interested in the lease of any lands"—Labourer's cottage.*

The defendant was summoned and convicted at Petty Sessions for acting as a district councillor while disqualified, the ground of disqualification alleged and proved being that at the time of so acting he was in occupation of a labourer's cottage and allotment, under the Labourers (Ireland) Act, under a monthly agreement of letting from the district council:—

Held, on case stated, that such letting was not a "bargain or contract" within the meaning of the Local Government (Application of Enactments) Order, Article 12, clause 4 (*e*); that, even if it was such a bargain or contract, still it came within the exception of clause 5 (*a*) of the same Article as a lease of lands; and that the conviction was wrong.

CASE STATED by the Justices of Co. Longford, pursuant to 20 & 21 Vict. c. 43.

Eivers was prosecuted at Granard petty sessions on the

(1) Before LORD O'BRIEN, L.C.J., and MADDEN and BOYD, JJ.

9th January, 1901, upon a complaint that, on the 2nd October, 1900, and on other dates, he "being a person disqualified from being a member of the Granard rural district council by reason of being concerned by himself in a bargain or contract entered into with the rural district council, did act when so disqualified as such member, contrary to the provisions of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), and the Local Government (Application of Enactments) Order" of the 22nd December, 1898.

Upon hearing the complaint the Justices made an order, convicting the defendant for having on the 2nd October, 1900, so acted while disqualified "by reason of being concerned by himself in a bargain or contract entered with the said rural district council," and they imposed a penalty of 1*s.* and 5*s.* costs.

The facts were, admittedly, to the following effect.

Eivers had acted as councillor of the Granard rural district council on the 2nd October, 1900, and on the other dates in question. On the 7th September, 1894, he had entered into an agreement in writing with the guardians of the Granard union for the monthly letting to him, as an agricultural labourer, of a cottage and half an acre of land under the Labourers (Ireland) Acts. The agreement was in the ordinary printed form, and contained the covenants usual in such cases. Eivers admitted the execution of this agreement by him, and the continuing subsistence of the tenancy and the transfer of the guardians' interest as lessors to the Granard rural district council under the Local Government (Ireland) Act, 1898, sect. 33.

At the hearing before the Justices, it was contended, for Eivers, that the agreement of September, 1894, was not a bargain or contract within the meaning of Article 12, clause 4, sub-sect. (*e*) of the schedule to the Local Government (Application of Enactments) Order of the 22nd December, 1898, and, further, that the agreement was a lease of lands within the meaning of clause 5, sub-sect. (*a*) of the same Article.

The Justices were of opinion "that the evidence brought the case within the operation of the Local Government (Ireland) Act, 1898, and the Local Government (Application of Enactments)

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Order of the 22nd December, 1898, and the schedule thereto, and rendered the defendant legally liable thereunder," and convicted the defendant, but at his request submitted, for the opinion of the Court, the question whether they were correct in point of law in their determination.

The Local Government (Application of Enactments) Order of the 22nd December, 1898, provides:—

Article 12, clause 4. A person shall be disqualified for being elected or chosen, or being a member of a council of a county, or of a district, or of a board of guardians, or of any town commissioners, if he— . . .

(*e*) is concerned by himself or his partner in any bargain or contract entered into with the council, board, or commissioners, or participates by himself or his partner in the profit of any such bargain or contract, or of any work done under the authority of the council, or board, or commissioners, and for the purpose of this provision any bargain or contract with a county council in respect of any public work in a district shall be deemed to be also a bargain or contract with the council of that district.

. . . . . .

Clause 5. Provided that a person shall not be disqualified for being elected or chosen, or being a member of any such council, board, or commissioners, by reason of being by himself or his partner, interested—

(*a*) in the sale or lease of any lands, or in any loan of money to the council, board, or commissioners, or in any contract with the council for the supply from land of which he is owner or occupier, of stone, gravel, or other materials for making or repairing highways . . .

Cuming and *S. L. Brown*, *K.C.*, for the defendant below, argued that a letting, under the Labourers (Ireland) Act, 1883, and amending Acts, was not such a bargain or contract as was contemplated by Article 12, clause 4 (*e*), and that, even if such a contract, it would come within the exception of clause 5 (*a*) as a lease of lands: *Reg.* v. *Gaskarth* (1).

W. G. Gibson and *Matheson*, *K.C.* (*Wakely*, *K.C.*, with them), for the Local Government Board, contended that the letting was, under the Labourers (Ireland) Act, 1883, sect. 13, a cottier tenancy, and not a lease: (citing *O'Sullivan* v. *Ambrose* (2)); that, in any event, the exception in clause 5 (*a*) was of leases *to*

(1) 5 Q. B. D. 321. (2) 32 L. R. Ir. 102.

the council, and that the defendant was, therefore, rightly convicted for acting while under disqualification, inasmuch as the letting was a contract within clause 4 (*e*).

[*Re Denroache* (1), and *Nell* v. *Longbottom* (2), were also cited.]

LORD O'BRIEN, L.C.J. :—

We are all of opinion that the conviction was wrong. It has been argued that the letting was not a "lease," and that the words of the proviso in clause 5 (*a*) of Article 12 extend only to leases *to* not *by* the council. But upon this, *Reg.* v. *Gaskarth* (3) is directly in point. That case was decided by two eminent Judges (Lush and Field, JJ.), and we should follow it. There, as here, the words of the proviso were "interested in the sale or lease of any lands or in any loan of money to the local board"; and Mr. Justice Lush says (at p. 324) :—"I think the first branch of the exception ends with the word 'lands,' and, I think, the words are intended to cover a lease of a farm for agricultural and sewage purposes, whether made by or to the local board."

As to the other point, that this is a cottier tenancy and not a lease, we are of opinion that the letting, which created a tenancy for a month certain, was a lease. This seems to follow from the words of the 4th section of the Landlord and Tenant Act, 1860, which enacts that "every *lease* or contract with respect to lands, whereby the relation of landlord and tenant is intended to be created . . . for any definite period of time, not being from year to year, *or any lesser period*," shall be in writing, and from the well-known case of *Wright* v. *Tracey* (4), where see the judgment of Fitz Gerald, B., at pp. 495, 496.

The Labourers (Ireland) Act, 1883, section 13, provides that "it shall be the duty of the sanitary authority to make lettings of the tenements erected or acquired by them under this Act, upon such terms and conditions that the tenancies created by such lettings shall be cottier tenancies within the meaning of" the Landlord and Tenant Act, 1860, save as to the limits of rent

(1) Ir. Circ. Cas. 36.
(2) [1894] 1 Q. B. 767.
(3) 5 Q. B. D. 321.
(4) I. R. 8 C. L. 478.

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reserved, "and tenancies created by a sanitary authority under this Act shall not be excluded from the provisions" of the Act of 1860, "which relate to cottier tenancies, by reason only that the rents reserved exceed such limits." But in this enactment the intention of the Legislature was solely to render it easy for the sanitary authority to determine the tenancy. The Justices were wrong in point of law, and the case will be remitted to them with the opinion of the Court to that effect. The defendant must have his costs against the respondents.

MADDEN and BOYD, JJ., concurred.

Solicitor for appellant: *C. Farrell.*

Solicitors for the Local Government Board: *T. T. Mecredy & Son.*

A. E. R. J.

K. B. Div. 1901. Feb. 18. April 16.

THE QUEEN (CHRISTIE) *v.* THE JUSTICES OF LONDONDERRY (1).

THE QUEEN (BALLANTINE) *v.* SAME (1).

Justices—Summary conviction—Obstruction—Claim of right—Jurisdiction ousted—Towns Police Clauses Act, 1847 (10 & 11 *Vict. c.* 89), *sect.* 28.

To a complaint before Justices at Petty Sessions under sect. 28 of the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89), for obstructing a public footway, it is a good defence that such footway was dedicated to the public, subject to the right of the defendant to commit the acts of obstruction complained of, and such a defence if raised *bona fide* ousts the jurisdiction of the Justices. The evidence, however, to establish such defence should be of a cogent character.

MOTIONS on behalf of the complainant, a Head Constable, R.I.C., to discharge conditional orders for *certiorari* obtained by the respective prosecutors.

(1) Before LORD O'BRIEN, L.C.J., and GIBSON, MADDEN, and BOYD, JJ.

CHRISTIE'S CASE.

John Christie, the applicant here, and the defendant below in the first of these cases, was the owner of a store abutting on a public thoroughfare in the city of Londonderry, known as Foyle-street, consisting of a footway and a roadway. He was charged before the Justices at Petty Sessions on a summons brought under the 28th section of the Towns Police Clauses Act, 1847, 10 & 11 Vict. c. 89, issued at the complaint of William Lucas, Head Constable, R.I.C., with having at Foyle-street, in the city of Londonderry, wilfully caused an obstruction in the public foot-path by placing bags of goods thereon and using a hoist over the same to the obstruction, annoyance, or danger of residents or passengers. On the hearing of the summons it was proved that the defendant caused a barrel to be placed on end in the footway between his store and carts which stood on the roadway. Sacks of goods were taken from the carts and placed on the barrel, and thence lifted by a hoist to an upper storey of his store. While this was being done no passengers could pass along the footway at the point where the obstruction was. Evidence was given on behalf of the defendant that the hoist had been used in this way for forty-eight years. It was contended by the defendant's solicitor that the obstruction was not wilful; that the defendant had a prescriptive right to do the acts complained of; and that as a *bona fide* question of title arose, the magistrates had no jurisdiction. The majority of the magistrates considered that their determination of the matter involved no question of title save that which the statute imposed on them, which involved the duty of deciding whether the footway in question was a public footway, and whether it had been obstructed in contravention of the statute. They considered they were bound to determine these questions, and they did determine them against the defendant, and convicted him of the offence charged, and imposed a fine on him.

The defendant obtained a conditional order for a writ of *certiorari*, directed to the Justices to remove the conviction into the Queen's Bench Division for the purpose of being quashed, on the grounds (*inter alia*) that the jurisdiction of the Justices was ousted by reason of a *bona fide* question of title to do the acts com-

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plained of, arising and being involved in the investigation of the complaint, and that the said acts were done in the *bona fide* assertion and exercise of such claim of title, and that the defendant acted under a fair and reasonable supposition that he had a right to do the acts complained of.

BALLANTINE'S CASE.

Mathew Ballantine, the applicant here, and the defendant below in the second case, was the owner of a store abutting on a public thoroughfare in the city of Londonderry, known as Bond's Hill, consisting of a footway and a roadway. He was charged on a summons brought under the same Act and section as in *Christie's Case*, with having at Bond's Hill, in the city of Londonderry, wilfully caused an obstruction on the public footpath by placing a gangway or platform across it to the obstruction, annoyance, or danger of residents or passengers. On the hearing of the summons it was proved that the defendant caused a gangway to be placed, from carts which stood outside the footway, to the entrance of the defendant's store, across the footway, and about 2 feet 9 inches above the same, and that his goods were carried along this gangway into and out of his store, and that while this gangway was so placed it was impossible for foot passengers to pass along the footway. It was also proved that the footway in question was a public one. Evidence was given on behalf of the defendant that the footway in question had been constructed by the city council about twelve years before, that during that time the defendant's goods were always transported across it in the same manner, and that previously to the making of the footway carts used to draw up close to the entrance of the store. It was contended by the defendant's solicitor that the obstruction was not wilful; that the footway when constructed was taken subject to the right of the defendant to use it as he did; and that as a *bona fide* question of title arose the magistrates had no jurisdiction. The magistrates made a similar order to that in *Christie's Case*, and the defendant obtained a conditional order for a *certiorari* on the same grounds as in that case.

Morphy, for the complainant below in both cases, now moved to discharge the conditional orders.

The charge is brought under the 28th section of the Towns Police Clauses Act, 1847, 10 & 11 Vict. c. 89, which Act is applied to the city of Londonderry by the 7th section of the Act for the Improvement of the Borough of Londonderry, 11 & 12 Vict. c. cxli., Loc. & Pers. In a charge under that section of the Towns Police Clauses Act the magistrates have jurisdiction to determine whether a footpath is a public one or not, though this may involve a question of title: *Reg.* v. *Young* and *White* (1); *Leicester Urban Sanitary Authority* v. *Holland* (2); *Williams* v. *Adams* (3); *Ex parte Vaughan* (4). The Act is one of police regulation intended to facilitate traffic in public thoroughfares, and its operation should not be clogged by considerations of limited dedication.

The power of arrest without a warrant, given to a constable who sees an offence within section 28 committed, is inconsistent with the right claimed here. Sections 47 and 51 of the Towns Improvement Clauses Act, 1847, 10 & 11 Vict. c. 34, are also inconsistent with such right. The effect of these sections is to vest the surface of the streets in the Commissioners; any injury to private rights caused thereby is a matter for compensation under section 19. The obstruction here is wilful: *Fearnley* v. *Ormsby* (5).

[He also referred to *Jones* v. *Matthews* (6); *Reg.* (*Collins*) v. *The Justices of Fermanagh* (7); *Hudson* v. *MacRae* (8).]

Henry, K.C., and *Horner*, for Christie and Ballantine:—

Where the title to property is in question the jurisdiction of the Justices is ousted: Paley on Summary Convictions (7th ed.), pp. 155, 156; *Reg.* v. *Speed* (9). There may be a limited dedication of a public way: *Arnold* v. *Blaker* (10); *Vestry of St. Mary's*,

(1) 52 L. J. (N. S.) M. C. 55.
(2) 57 L. J. (N. S.) M. C. 75.
(3) 2 B. & S. 312.
(4) L. R. 2 Q. B. 114.
(5) 4 C. P. D. 136.
(6) 1 *Times* L. R. 482.
(7) 14 L. R. Ir. 50,
(8) 4 B. & S. 585.
(9) 1 Lord Raymond, 583.
(10) L. R. 6 Q. B. 433.

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Newington, v. *Jacobs* (1); *Fisher* v. *Prowse* (2); *Jones* v. *Matthews* (3); *Attorney-General* v. *Horner* (4).

[They also referred to *Reg.* v. *Longton Gas Co.* (5).]

Cur. adv. vult.

REG. (CHRISTIE) v. JUSTICES OF L'DERRY.

REG. (BALLANTINE) v. SAME.

April 16.

LORD O'BRIEN, L.C.J.:—

My brother Gibson will read the judgment of the Court.

GIBSON, J.:—

The applicants were respectively convicted under the 28th section of the Police Clauses Act, 10 & 11 Vict. c. 89, incorporated in the local Derry Act, for wilfully causing obstruction on public footways in the streets of Derry. The obstruction in *Christie's Case* was caused by the use of a hoist, which, when in operation, interfered with passage on a footpath in Foyle-street, Derry, next Christie's premises. There was evidence that the hoist had been used in the same way for forty-eight years. Ballantine was charged with obstructing a footpath at Bond's Hill, Derry, by placing a gangway from a cart across the path to his store. The footpath was made by the road authority twelve years ago, and during that time goods had been brought into Ballantine's premises by such gangway from time to time. Previous to the construction of the footpath carts used to draw up close to the entrance. In neither of the cases did it appear that the whole of the street was obstructed. The magistrates held that what was done constituted an obstruction, and that such obstruction was wilful. They overruled the defendant's objection to jurisdiction, founded on the suggestion of a *bona fide* question of title, holding that no such question of title could arise under the Police Clauses Act, and that their jurisdiction was confined to considering whether the footpaths were public, and whether they were wilfully obstructed.

Before us the substantial point argued was whether the provisions of the statute precluded inquiry into antecedent title or limited dedication. It was hardly questioned that if this was

(1) L. R. 7 Q. B. 47.
(2) 2 B. & S. 770.
(3) 1 *Times* L. R. 482.
(4) 11 A. C. 66.
(5) 2 E. & E. 651.

decided adversely to the applicants the obstruction was wilful. It was not disputed by Mr. Morphy that if title to justify the acts of obstruction might upon the evidence be established, *certiorari* could not be resisted, as there would have been in that view no jurisdiction to determine any such question of title. On the other hand, it was not denied by Mr. Henry that there was jurisdiction to determine whether the place was a street or public pathway, though the decision of that fact might involve questions of title: *Williams* v. *Adams* (1); *Young's Case* (2).

That there may be a limited dedication of a public highway is clear. A dedication of a public path in the country may be subject to a right to plough up at certain periods: *Arnold* v. *Blaker* (3); a quay may be dedicated subject to a right to place goods on part of such quay: *Morant* v. *Chamberlin* (4); or a street may be dedicated subject to the holding of fairs or markets. The right so reserved may be used as a defence to a prosecution for obstruction founded on the General Highway Act, 5 & 6 Wm. 4, c. 50 (which applies to all highways). The 72nd section of that Act creates several kinds of offence for wilful obstruction, and resembles in its broad lines section 28 of the Police Clauses Act. In two cases of successful prosecution, under section 72, it was assumed, both by the Court of Common Pleas and Queen's Bench, that the statute did not apply if there was an antecedent title to do the acts constituting the obstruction: *Gerring* v. *Barfield* (5); *Simpson* v. *Wells* (6). So under London Paving Acts, which forbid street obstructions, the statutory prohibition was held not to interfere with a previous title to hold markets: *Great Eastern Ry. Co.* v. *Goldsmid* (7); *Attorney-General* v. *Horner* (8). These cases are extremely strong; and the only question before us is whether the terms of the Police Clauses Act (though in *pari materia* with the Acts referred to) are sufficient to show that the offence is committed, whether there was an antecedent title or not. The object of the Act, which was to secure facility and safety of locomotion in the public streets; the power of arrest given to

(1) 2 B. & S. 312.
(2) 52 L. J. (N. S.) M. C. 55.
(3) L. R. 6. Q. B. 433.
(4) 6 H. & N. 541.
(5) 16 C. B. (N. S.) 597.
(6) L. R. 7 Q. B. 214.
(7) 9 App. Cas. 927.
(8) 11 App. Cas. 66.

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any constable who sees an offence committed; and the circumstance that apparently some of the sections (*e.g.* sections 21 and 22) must control any private reserved right would seem at first sight, apart from case law, to favour the magistrates' view, that no question of title could arise, and that the offence was complete when there was an intentional obstruction in a street. How, it may be asked, could the policeman know anything of the antecedent rights existing before the street came into being? He can only go by what he sees before his eyes. What is the magistrate to do with the arrested offender if he loses jurisdiction on a *bona fide* suggestion of title justifying the supposed offence? This argument struck me at first as persuasive, until I found that under the Malicious Injuries Act, 24 & 25 Vict. c. 97, sec. 61, there was an analogous power of arrest when a person was found committing an offence; yet, that under section 52, a fair and reasonable supposition of right is an answer to a prosecution. The power of arrest may, therefore, co-exist with the right to justify on the ground of title.

The cases on section 28 (which is the same as section 73 of the Towns Improvement Act, 17 & 18 Vict. c. 103), though they tend to support the applicants' argument, are by no means conclusive. In *Jones* v. *Matthews* (1), relied on by applicants' counsel, though it was apparently assumed that title to obstruct could be shown as a defence to a prosecution under section 28, *certiorari* went on the ground of insufficiency of the evidence to prove the offence, rather than on the point of jurisdiction being excluded by the question of title. On the other hand, the case of *Leicester Sanitary Authority* v. *Holland* (2), pressed by Mr. Morphy, was also based on the particular evidence; and the arguments and decision rather suggest that upon evidence of ancient user a different result might have been arrived at. The prosecution there was under a clause of section 28 not making "wilfully" part of the offence, and the user was recent.

But for the authorities, I should have been disposed to agree with the view taken by the Justices. It is quite intelligible that a dedication of a way with an existing physical obstruction on

(1) 1 *Times* L. R. p. 482. (2) 57 L. J. (N. S.) M. C. 75.

part of it may be validly made. The public who take the benefit must submit to the burden: *Fisher* v. *Prouse* (1); *Wilson* v. *Cunliffe* (2). But does the same principle apply where the acts complained of are obstructions introduced or done after dedication? and does it apply to statutes passed to protect the public from danger in the use of streets? Would 10 & 11 Vict. c. 34, s. 81, as to lighting obstructions in a street at night, be inapplicable by reason of a right reserved on dedication? The authorities are founded on the principle that private rights are not to be taken away without compensation: *Wilson* v. *Cunliffe* (2). I cannot find anything in the case to show that if the right claimed arose out of limited dedication when the streets were originally made, such right was or could have been extinguished by compulsory purchase. The evidence is inconsistent with any such purchase, for the user has been continuous. In *St. Mary's, Newington*, v. *Jacobs* (3) it was laid down that the provisions of the Highway Acts and Metropolis Local Management Acts were subordinate to the rights reserved by the owners. The Court, however, seems to have thought that no right could be reserved which would substantially interfere with public passage; but they had not before them the authorities above referred to—some of them not decided at the time—which establish that what is a *prima facie* nuisance to locomotion may be justified by a limited dedication.

No distinction was drawn before the magistrates or before this Court between the two cases. *Ballantine's Case* is not so strong as *Christie's*. The mode of rolling goods along the gangway has only existed since the construction of the footpath twelve years ago, but as this method of delivering goods was in substitution for that previously used when the carts drew up immediately alongside Ballantine's store, I think that, having regard to the course of the argument, both cases must stand or fall together.

In deference to the authorities above discussed, which seem to rule the point in principle, I am compelled (though unwillingly) to hold that upon the evidence of user there might be a *bona fide* question of title, and that as the magistrates have not found that the objection was otherwise than *bona fide*, the convictions must on this ground be quashed. The decisions seem to show that such

(1) 2 B. & S. 770. (2) 29 L. T. (N. S.) 913. (3) L. R. 7 Q. B. 47.

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REG. (CHRISTIE) *v.* JUSTICES OF L'DERRY.

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an obstruction as here complained of may be justified by a right reserved in dedication; and that such right, if it existed, would not be extinguished by statutory provisions such as are contained in the Police Clauses Act. In my opinion the evidence ought to be of a very cogent character to furnish an answer to a prosecution for obstruction. User not exceeding twenty years was in *Gerring's Case* (1) held to be insufficient. The user here is all subsequent to the Police Clauses Act; the evidence is not fully before the Court; and if the Justices had decided that the claim of right was fictitious, I would not have been disposed to interfere with their decision. It is most improbable that the action by the parties would be fairly attributed to a right reserved on the original construction of the streets centuries ago: *Morant* v. *Chamberlin* (2).

As the objection to the Justices' jurisdiction prevails, it is unnecessary to discuss the point founded on the use of the word "wilfully." It was hardly argued by applicants' counsel, and the case cited by Mr. Morphy, *Fearnley* v. *Ormsby* (3), may be in point,—as the acts complained were intentionally done by the defendants. On this point, however, it is unnecessary to pronounce any decision.

LORD O'BRIEN, L.C.J.:—

I am in the same position as my brother Gibson. Were it not for the decided cases I should have acceded to Mr. Morphy's argument that the doctrine of limited dedication does not apply, having regard to the provisions of statute 10 & 11 Vict. c. 89. I cannot, however, get out of the cases, but I am very clearly of opinion that the evidence to establish such limited dedication should be of a very cogent character. It should be most cogent, clear, and consistent.

MADDEN and BOYD, JJ., concurred.

Solicitor for the applicant, John Christie: *James Toland.*

Solicitor for the applicant, Mathew Ballantine: *Patrick Maxwell.*

Solicitor for the complainant: *Sir Patrick Coll.* J. G. T.

(1) 16 C. B. (N. S.) 597. (2) 6 H. & N. 541. (3) 4 C. P. D. 136.

SWITZER & CO. *v.* THE COMMISSIONER OF VALUATION (1).

K. B. Div. 1901.

June 10, 12.

Appeal. July 22, 23.

Valuation Acts—Rateable premises—Different premises held under different leases converted into one building—Unit of valuation—Bulk valuation—Town clerk's list—Jurisdiction of Commissioner of Valuation.

Prior to 1897 Switzer & Co. were the occupiers of certain premises in Grafton-st., Dublin, and also of other premises in Wicklow-st., Dublin, held under different leases, and from different lessors, and valued as nine separate tenements. These premises consisted of one large shop, the main front of which faced Grafton-street. Structurally there was communication from one portion of the premises to the other, and they all formed the shop. The premises were valued separately as nine separate tenements, in respect of which S. & Co. had the right to deduct the landlord's proportion of poor-rate and income tax. In 1897 S. & Co. purchased the lessees' interest of certain houses in Clarendon-street, which ran parallel to Grafton-street, at the rere of their existing premises. These premises were held under separate leases at rents varying in amount, and each of the houses in Clarendon-street had previously been valued separately. S. & Co. pulled down the houses, and erected on the site a large building facing Clarendon-street. Access was opened from the Grafton-street premises to the new building, so as to form one whole concern. When the Clarendon-street premises had been erected the rate collector, in pursuance of sect. 4 of the Valuation Act, 1854, placed the Clarendon-street premises on the list requiring revision of valuation, and the said list was duly transmitted by the Town Clerk to the Commissioner of Valuation, who, thereupon, struck out the separate valuations of the premises, and placed one bulk valuation on the entire premises in Grafton-street, Wicklow-street, and Clarendon-street:—

Held (1), that the Commissioner had no jurisdiction to make a valuation of any property other than that in the Town Clerk's list; and (2) that he must make a separate valuation of all the separate properties held under different tenancies.

Case stated by the Recorder of Dublin, who refused to alter a revised valuation made of the premises of Switzer & Co.

(1) In the King's Bench Division, before Palles, C.B., and Johnson and Gibson, JJ.

K. B. Div. 1901.

SWITZER v. COMMR. OF VALUATION.

The case was in the following terms:—

This is an appeal pursuant to section 22 of the Valuation (Ireland) Act, 1852 (15 & 16 Vict. c. 63) against the decision of the Commissioner of Valuation, refusing to alter the revised valuation purporting to have been made in pursuance of the Valuation (Ireland) Acts, 1852–1874, and Order in Council under section 105 of the Local Government (Ireland) Act, 1898, in respect of the rateable tenements in the occupation of Switzer & Co. (Limited), known as No. 87A, in the rere of No. 87, Grafton-street, No. 88, Grafton-street, and tenement at the rere of 89, Grafton-street, Nos. 91, 92, and 93, Grafton-street, Nos. 38, 43, and 44, Wicklow-street, and Nos. 1, 2, 3, 4, and 5, Clarendon-street, all in the Royal Exchange Ward, Union of South Dublin, and city of Dublin.

Prior to the year 1900 Switzer & Co. held, and still hold, Nos. 88, 91, 92, and 93, Grafton-street, being houses facing the said street, described on the valuation lists as 87A; also premises built on a yard at the rere of No. 89, Grafton-street, and Nos. 43 and 44, Wicklow-street. The said premises were held under nine different leases, and were valued as nine separate tenements, although structurally they all communicated with one another, and formed one business establishment.

Under the said grants and leases the tenants had the right of deducting landlord's proportion of poor-rate and income tax. In the valuation lists up to and including the list for the year 1900 the name of Switzer & Company (Limited) appears as the occupier of nine distinct sets of premises, the names of the immediate lessors for each set of premises appearing separately in the lists.

In 1897 Switzer & Co. purchased the lessees' interest in the premises Nos. 1 to 5, Clarendon-street, which were the houses situate at the back of their premises in Grafton-street and Wicklow-street, and are held as follows:—

No. 1, Clarendon-street, held for sixty-one years from 1853 at a yearly rent of £15; No. 2, Clarendon-street, held for sixty years from 1852 at a yearly rent of £16; No. 3, Clarendon-street, held for one hundred years from 1849 at a yearly rent of £16; No. 4, Clarendon-street, held for sixty years from 1852 at

a yearly rent of £16; No. 5, Clarendon-street, held for sixty years from 1851 at a yearly rent of £20.

Prior to the purchase the houses were in the occupation of tenants, and each of the houses 1 to 5 was valued separately as follows:—No. 1, Clarendon-street at £15; No. 2 at £15; No. 3 at £14; No. 4 at £15; and No. 5 at £17.

Switzer & Co. pulled down the houses Nos. 1 to 5, Clarendon-street, and erected on the site thereof a large building facing Clarendon-street, with two entrances therefrom. Portion of the rere walls of the premises of Switzer & Co. in Grafton-street and Wicklow-street was removed so as to open access from these premises to the Clarendon-street premises, there being no separation on the ground floor, but free access from one part of the shop to another. Except for such removal the premises in Grafton-street or Wicklow-street were not structurally altered or their boundaries changed.

When the fabric of the Clarendon-street premises had been erected, the rate-collector, in pursuance of section 4 of the Annual Revision of Valuation (Ireland) Amendment Act, 1854, put on his list of tenements requiring revision of valuation Nos. 1 to 5, Clarendon-street, and delivered the same to the Town Clerk, and the Town Clerk transmitted the said list to the Commissioner of Valuation with the opinion of the Council thereon that such revision was necessary. The Commissioner of Valuation struck out in the valuation lists the separate valuation of the premises in the occupation of Switzer & Co., and valued the whole block of buildings in Grafton-street, Wicklow-street, and Clarendon-street as one tenement, describing Switzer & Co. (Limited) as occupiers thereof, and Otway, Johnson, Jameson, and others as immediate lessors, and he placed one bulk valuation on the entire premises, and transmitted the lists so revised to the Town Clerk. It appeared that Otway, Johnson, and Jameson were severally lessors of parts, though not in fact immediate lessors of all the said premises. Switzer & Co. appealed to the Commissioner of Valuation against this revised valuation on the ground that the same was not in accordance with the provisions of the Valuation Acts, and that it was excessive, having regard to the valuation of similar premises in the neighbourhood, reserving

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the right to alter or amend such notice. The Commissioner of Valuation on the hearing of the appeal declined to alter the said bulk valuation of £1900, and he transmitted to the Town Clerk the list unaltered as respects the bulk valuation. Switzer & Co. appealed to the Recorder on the grounds :—

1. That inasmuch as the premises in the occupation of the appellants were comprised of several distinct tenements or hereditaments held under separate titles for different terms, the said revised valuation is bad on the face of it, as not being in accordance with the manner and form prescribed by the said Acts in that behalf requiring every tenement or rateable hereditament to be separately valued.

2. That the revised valuation had been made without, and in excess of, jurisdiction.

3. That during the year preceding the revised valuation there had been no alteration in the limits or value of the tenements or hereditaments 87A in the rere of 87, Grafton-street, No. 88, Grafton-street, and Nos. 43 and 44, Wicklow-street, and

4. That the houses in Grafton-street and Wicklow-street had been improperly included in the revised valuation.

Matheson, K.C., and *Henry Hunt*, for Switzer & Co.

Wright (*Solicitor-General*) and *Vesey Fitzgerald*, for the Commissioner of Valuation.

June 12.

PALLES, C.B. :—

The questions argued before us arise upon a case stated by the learned Recorder of Dublin, upon the hearing by him of an appeal, under section 22 of the Valuation (Ireland) Act, 15 & 16 Vict. c. 63, against a decision of the Commissioner of Valuation, refusing to alter a revised valuation, purporting to be made in pursuance of the Valuation Acts, 1852 to 1874, in respect of rateable premises the property of the appellants.

The appellants, Messrs. Switzer & Company, prior to the year 1900, held, and still hold, a number of premises in Grafton-street

and Wicklow-street, namely, Nos. 88, 91, 92, and 93, Grafton-street; premises built on a yard at the rere of No. 87, Grafton-street, described in the valuation list as 87A; premises built at the rere of No. 89, Grafton-st., and Nos. 38, 43 and 44, Wicklow-st. These premises were held under nine different leases, and prior to, and in, 1900 they were valued as nine separate tenements in the valuation list, although structurally they communicated with each other, and formed one business establishment. Under those grants and leases the tenants had the right of deducting the landlord's proportion of poor-rate and income tax. In the valuation lists, up to and including the list for 1900, the names of the appellants appear as the occupiers of these nine distinct sets of premises, the names of eight of the immediate lessors also appearing separately in the lists. In or about the year 1897 the appellants purchased the lessees' interests in the premises Nos. 1 to 5, Clarendon-street, which were houses at the rere of, and immediately abutting upon, their Grafton-street premises. These Clarendon-street premises were held under five separate leases. Prior to the purchase these houses were in the occupation of tenants. The Valuation Acts direct that separate tenements shall be indicated upon the latest Ordnance Map; and of course the valuation lists, and the indication contained in those maps, include a clear specification of the premises held under each of the nine leases under which the appellants held the premises in Grafton-street and Wicklow-street; and also those held under each of the five leases of the premises in Clarendon-street. After the purchase the appellants pulled down the houses Nos. 1 to 5, Clarendon-street, and erected on their sites a large building facing Clarendon-street, with two entrances therefrom. A portion of the rere walls of the premises of the appellants in Grafton-street and Wicklow-street was removed so as to open access from those premises to the Clarendon-street premises, there being no separation on the ground floor, but free access from one part of the shop to another; and the case finds that, except for such removal, the premises in Grafton-street and Wicklow-street were not structurally altered or their boundaries changed. When the fabric of the new Clarendon-street premises had been erected, the Town Clerk served upon the Commissioner of Valuation a notice, under section 4 of the Act of 1854,

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requiring a revision of the valuation in respect of the premises situated in Clarendon-street. The mode in which the Commissioner of Valuation effected this revision was by striking out of the valuation lists the separate valuation of the nine separate sets of premises that had previously been valued separately; and by valuing as one rateable hereditament the whole block of buildings in Grafton-street, Wicklow-street, and Clarendon-street, describing the appellants as occupiers thereof, and inserting "Otway, Johnson, Jameson, and others," as immediate lessors. The Recorder states that those persons, so stated as immediate lessors, are severally lessors of parts, but are not in fact immediate lessors of all the premises. The Commissioner of Valuation placed a bulk valuation of £1900 on the entire block of premises. An appeal was taken to the Recorder, and he affirmed the decision of the Commissioner of Valuation, and upon that affirmance stated this case.

Two questions were argued before the Recorder, and were argued here. The first is, whether the revised valuation is bad, upon the ground that premises held under separate immediate lessors, and under separate leases, should be separately valued. The second is, whether there was any jurisdiction to revise the valuation of any of the premises, except those included in the Town Clerk's list of premises requiring revision, namely, the Clarendon-street premises.

The case has been very fully and elaborately argued before us, and I fully admit the importance of the questions raised.

I thoroughly understand the difficulty, even when the limits of the premises held under separate leases are actually delineated and known, of dividing the valuation of one establishment, such as that of the appellants, into the portions of it which ought to be attributed to the portion of the premises held under each particular lease. I feel that a question is involved, somewhat of the character of that which arises in the rating of railways, but in reference to which there are no principles laid down, such as those which a long series of cases in England, extending from the time of Lord Denman to the present, lay down as to the rating of railways. As to premises such as these before us, the mode of valuation of tenements is of a different nature from that which

exists in this country with regard to the rating of railways. I think therefore that the decision at which we have arrived may possibly involve a certain amount of difficulty. That, however, cannot prevent us from giving the proper construction to the Act of Parliament; but it is one of the reasons why I have approached the consideration of the case with much care

At first I thought that we could decide the case by determining one only of the questions—that is, by deciding what was the unit of valuation under the Valuation Acts as they now stand. But, upon further consideration, I find that I cannot; because if I decide, as I am about to do, that more than one separate tenement for the purpose of valuation has been included in this valuation, and that therefore the case must go back to the learned Recorder, I shall be bound to give him my opinion upon the second question of law; that is, whether, when he again entertains this appeal, he will be obliged to limit his decision to the premises in Clarendon-street, or will he be at liberty to alter the valuation of the premises in Grafton-street and Wicklow-street, although he must treat as a different rateable hereditament and as a different unit, each portion of those premises which is held under a different lease?

Now, I shall take, first, the question of what is the unit of valuation; and I shall state in the first instance, in a few words, the conclusion at which I have arrived before I mention the reasons which have induced me to do so. In my opinion, the unit of valuation of premises in the occupation of tenants is, such hereditaments, of the description in section 12 of the Act of 1852, as are in the occupation of the same occupier, holding from the same immediate lessor, under the same lease or contract of tenancy. In this definition the expressions "occupier" and "immediate lessor" may include a plurality of persons being joint occupiers, or joint immediate lessors, who between them may constitute one occupier or one immediate lessor. But, if premises (1) are in the occupation of several distinct occupiers; or, (2) although in the occupation of the same persons, are held under separate immediate lessors; or, (3) although in the occupation of the same person, and held under the same immediate lessor, are so held under several distinct leases or

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contracts of tenancy; *each* of those premises is a separate rateable hereditament, and more than one of them cannot be included in any one single valuation. In other words, in my opinion the characteristic of a tenement to be separately valued, is a tenement, all of which is in the occupation of the same occupier, under the same immediate lessor, under one contract of tenancy.

There are a few sections in the Valuation Act of 1852 that bear upon this question. The 11th section enacts that "in every valuation hereafter to be made, or to be carried on or completed under the provisions of this Act, the Commissioner of Valuation shall cause every tenement or rateable hereditament hereinafter specified to be separately valued." Now, you would expect from that that you would be able to ascertain, from the subsequent sections of the Act, something in the nature of a definition of a separate tenement or rateable hereditament; but the Act does not contain any such definition. The words "hereinafter specified" refer to section 12; but that section does no more than define the character of the property which can constitute "rateable hereditaments"; it does not give us any assistance in defining what is the unit answering the description of "tenement" or "rateable hereditament"—terms which, in this Act of Parliament, may be treated as almost identical.

The 17th section of the Act of 1852 provides that "the Commissioner of Valuation," at the times therein specified, "shall prepare and make out a list or table of the hereditaments and tenements" which he has valued, "and of their respective valuations . . . in the form set forth in the schedule to this Act," and shall transmit the same to certain officers of the rating authorities therein specified, for the purpose of being made the basis of rating. The form set forth in the schedule contains certain columns, one of which is headed "Names," and is divided into two separate sub-columns, the heading of the first of which is "Townlands and Occupiers," and of the second "Immediate Lessors." There are then columns for the "Description of Tenement," "Area," and "Rateable Annual Valuation." From this form it is clear that the Legislature intended that, in relation to each tenement separately valued, there should be a statement of

the occupier, and of the immediate lessor, when there was an immediate lessor; and the effect of this schedule, if mandatory—a matter which I shall afterwards consider—is that the names of the occupier and immediate lessor form a material, indeed an essential part of the description of the hereditament or tenement to be valued. Consequently, when either the occupier or immediate lessor are not identical in respect of the entire tenement, it cannot be one single one within the meaning of the Act of 1852, because in that event it could not answer the description in the schedule to which I have referred.

I have said that this follows, provided the provisions of this schedule are mandatory. I now come to consider that question; and I may conveniently take with that, because it depends upon the same considerations, the question whether you can include in the one valuation, premises held by the same occupier, from the same immediate lessor, but under two different leases or contracts of tenancy.

This Act of 1852, which was the last principal Act of a number of Acts relating to valuation in Ireland, has for its object the determining a uniform valuation of lands and tenements for all public and local assessments. Its object at that time, and its sole object, was in relation to rates. The law as regards rating in 1852 was that, in the generality of cases, the occupier was to be rated; but there were some exceptions to that rule, one exception being that the immediate lessor was to be rated to poor-rate in certain cases, under the 6 & 7 Vict. c. 36, and other statutes, to which it is not necessary to refer particularly. But further, when the occupier was rateable, he was entitled to deduct from his immediate lessor half the poor-rate upon the amount of the rent, provided that rent did not exceed the valuation. If the rent did exceed the valuation, he was entitled to deduct the poor-rate upon half the valuation only. From this it is apparent that in many cases, in fact, in almost all cases, it was essential that the amount of the valuation of the premises held under each lease should be known, because a bulk valuation of premises held under several leases would not satisfy the purpose of ascertaining the liability of each lessor.

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Let me illustrate this. Suppose there was the same common immediate lessor, and the same common occupier, of two houses, Nos. 88 and 89, Grafton-street. Suppose that No. 88 is held at a rent of £100 a-year, and valued at £50 a-year, and that No. 89 is held at a rent of £50 a-year, and is valued at £100 a-year. The valuation of both, taken together, is £150: the rent of both, taken together, is also £150. But the tenant is not entitled to deduct half the rate that he pays upon the £150, because, upon the premises valued at £50 a-year, although he pays £100 a-year rent for them, he is entitled to deduct only the rate upon half of the £50. Thus his total deduction would be half the rate on £100 a-year, whereas if both tenements were held under the one lease the deduction he would be entitled to would be half the rate on £150 a-year. The result, therefore, is that the rights of the occupier and the immediate lessor cannot be ascertained unless each tenement is treated as a separate rateable hereditament and separately valued.

That is a consideration which governs the entire Act. I now go back to the 17th section. Unless section 17 is held to be mandatory (and, if it is, you must incorporate the entire schedule with it), you may have a valid valuation that will not give the particulars which are required for rating purposes. Unless that section is mandatory, the Commissioner is not bound to state the name of the occupier, because the occupier is only included in the list by the schedule referred to in section 17; he is not bound to state the immediate lessor, who is the person to be rated for premises valued at under £4; and no information will be given for the purpose of arriving at the respective liabilities of the landlord and tenant in reference to poor-rate. I have no hesitation in holding that section 17 is mandatory; and that when the Act was passed in 1852 it was the intention of the Legislature that the schedule should be filled up as accurately as it was in the power of the Commissioner to fill it. I do not wish to decide that it was essential that the actual name of the occupier, or the actual name of the immediate lessor, should be given in the schedule; in other words, that the Act would not be complied with if there was a wrong name of the occupier or a wrong name of the immediate lessor; but I hold that the

Legislature considered that the description of each separate tenement involved the fact that it, by which I mean the whole of it, was held by an occupier, from an immediate lessor, by *one* contract of tenancy. In the next year, 1853, the first Income Tax Act relating to Ireland was passed; and under it the immediate lessor's tax under Schedule A was to be calculated upon the valuation under the Act of 1852.

I now come to the Act of 1860 (23 Vict. c. 4), which strongly confirms the view I have taken. That Act, by section 6, directs that "the lists of valuation, and of every revision thereof, which the said Commissioner is by the said Acts, or either of them, required to make out and transmit to the guardians of any union, or to the town council of any borough, or to the treasurer of any county, shall be in the form specified in the schedule to this Act annexed, or in such other form as the Commissioners of Her Majesty's Treasury shall from time to time approve of . . . and no alteration shall be made in any such list or lists, or in the name of any occupier or lessor named therein, save by the Commissioner of Valuation, or some person duly authorized by him for that purpose, or by the order of a Court of General or Quarter Sessions upon appeal, or other Court of competent jurisdiction; provided that for the purpose of any poor-rate the guardians of any union may make such departure, *not affecting value*, from the particulars contained in the said lists, as may be necessary at the time of making the rate, to enable them to make a valid rating under the laws in force for the relief of the destitute poor in Ireland, subject to such appeal as is now by law provided, and any such departure shall be forthwith reported by the guardians to the Commissioner of Valuation."

Now, the schedule referred to in this Act is a little more detailed than that in the Act of 1852; but it continues to contain the columns of "Names," "Townlands and Occupiers," and "Immediate Lessors." The Act gives to the Treasury the power of altering the form from time to time; but I need not say that no alteration by the Treasury would be authorized by the section, which omitted anything which, on the true construction of the Acts as a whole, was a necessary constituent of the

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description of the hereditament to be separately valued. Upon the principle, then, of the cases cited by Mr. Fitzgerald in the course of his able argument the day before yesterday, I hold that when we ascertain, by the provisions of the Act of 1852, the true description of the thing intended to be a separate tenement or hereditament, that description cannot be altered by power being given to the Treasury to alter, in the way enacted here, that part of the schedule which was material in determining the construction of the Act. If the schedule be altered by the Treasury in such a way as to strike out all reference to the immediate lessor, the schedule to the Act of 1852 should still be considered as remaining in it for the purpose of construction, and be treated as if it had not been altered. The section I have read from the Act of 1860 appears to me to show that in the view of the Legislature the names of the occupier and immediate lessor were to be stated in the schedule, because there is a remarkable provision in the statute, that the name of the occupier or immediate lessor should not be altered, except by the Commissioner of Valuation himself, or some person duly authorized by him for that purpose. Then the section proceeds to authorize the guardians, when they are about to strike a rate upon this valuation, to alter *inter alia* the names of the occupier and the immediate lessor as they are stated in the valuation lists. Why? Because they may have ascertained that there is some error in these respects or that there has been some change in them between the date of making the valuation and the time of striking the rate; and, therefore, it is necessary to depart from the list, in order to make a valid rate. That section, in my opinion, shows to demonstration that as the direction as to occupier and immediate lessor was deemed by the Legislature to be material in reference to rating, so it must be deemed to be material in reference to the valuation lists.

For these reasons I have very clearly arrived at the conclusion I have already indicated, as to the unit of valuation.

I now come to the second question, the question of the jurisdiction of the Commissioner to interfere with the valuation of the premises in Grafton-street and Wicklow-street. Upon this

point also I am against the view taken by the learned Recorder. The question has not come before the Court in the present case for the first time. This Court, then constituted by Mr. Justice Andrews, Mr. Justice Johnson, and myself, had occasion to consider it very fully in *The Kildare Case* (1), now reported. I then stated that, in my opinion, the jurisdiction of the Commissioner of Valuation to revise the valuation was limited to a revision of the valuation of the premises included in the list served upon him in the present case, the list served by the Town Clerk. When that case was brought to the Court of Appeal, some doubt, I think, was thrown upon that view by Lord Justice Holmes. "The contrary of this proposition," he says, "has not been argued in this Court; and, indeed, counsel for the appellant, while not expressly admitting it, have assumed that if this objection to the revised valuation had been taken on the appeal to Quarter Sessions, it ought to have been decided in favour of the County Council. I propose to deal with the case on this assumption; and in the absence of argument on either side, we ought not to question the conclusion arrived at by the Divisional Court. At the same time I see the possibility of this matter arising hereafter in another shape and under other conditions, and as there are some expressions in this and other sections suggesting the view that the Commissioner of Valuation, to whom the lists have been delivered in the prescribed manner, can, in the course of his revision, go beyond the rateable hereditaments specified in such lists, I desire to keep this matter open for further consideration."

That desire of Lord Justice Holmes would in itself have rendered it my duty to consider anew the question as to which he entertained this doubt, even had it not been raised by counsel, but it has been most fully brought before us in the very able argument of Mr. Fitzgerald (by which we have been so much assisted). I have, accordingly, fully and in detail reconsidered the subject. Adopting the argument of Mr. Fitzgerald, I take it that the general proposition decided by this Court in

(1) [1901] 2 I. R. 215.

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The Kildare Case (1) is not disputed, provided we confine the basis of our decision to sections 4 and 5, unless it can be shown to be wrong by the considerations which were urged by Mr. Fitzgerald. Those considerations were three.

First, he argued that where there was a notice requiring the revision of something that was treated as one separate rateable hereditament, but which, in fact, was only part of a larger rateable hereditament, there was jurisdiction to value the entire hereditament. Secondly, that there are words in section 29 of the Act of 1852 which give an originating jurisdiction in this respect to the Commissioner of Valuation, and that this jurisdiction continues to exist, notwithstanding the repeal of that section; and, thirdly, that the Commissioner of Valuation had that power under the 20th section of the Act of 1852.

Upon the first contention of Mr. Fitzgerald I pronounce no opinion whatsoever. It is a matter that, in my view, requires very grave consideration; in fact, I am rather in favour of that contention. But, in the present case, it can have no application, because I have already held that the premises in Grafton-street and Wicklow-street were tenements to be separately valued from the Clarendon-street premises; and, therefore, that argument cannot avail as showing jurisdiction in the Commissioner of Valuatiou to revise the valuation of the former premises.

The second argument is an extremely ingenious and very interesting one. The 29th and 30th sections of the Act of 1852 have been repealed; but while they were in existence they regulated the jurisdiction of the Commissioner of Valuation upon a revision. The 30th section enacted that: "The Commissioner of Valuation shall himself cause a revision to be made of the valuation of the tenements in the several townlands and parishes of the said poor law union, or city, or town, the limits or value whereof shall have been altered as aforesaid, whether such tenements or hereditaments so altered in limits or value *shall have been included in the said lists or not;* and also in regard to any property, the annual value whereof is liable to frequent alteration as aforesaid."

(1) [1901] 2 I. R 215.

Now, undoubtedly, so long as that 30th section was in force, the Commissioner of Valuation had jurisdiction to go outside the list, and to revise the valuation of tenements and hereditaments, the limits of which had been altered, whether they were or were not included in the list. But then that section has been repealed, and with its repeal there is an end of the jurisdiction so given to the Commissioner. By the Act of 1854, under sections 4 and 5, a new and different jurisdiction has been given to him; and it seems to me to be impossible to contend that any part of the jurisdiction under the repealed section 30 can be held to continue.

But the argument is that the Act must be construed as a whole, as it was at the time it was passed, and that, therefore, in construing its unrepealed sections, the 29th and 30th sections may be taken into consideration; and in that Mr. Fitzgerald is undoubtedly right. He then goes on to the 31st section of the Act of 1852, which is not repealed; and he says that from that 31st section he gathers, by implication, that a jurisdiction in reference to the matter I have referred to remains in the Commissioner of Valuation. That 31st section says: "The owners or occupiers of all tenements, the area or valuation of which shall have been altered *as last aforesaid* in the list signed by the Commissioner of Valuation, shall have the same powers of appeal to the Commissioner of Valuation and to the Quarter Sessions, subject to the same conditions and provisions, and exercised in the same manner and to the same extent, as hereinbefore provided in regard to appeal: provided always that such total valuation of lands as last aforesaid of any townland shall not be increased or lessened at the hearing of any such appeal as aforesaid: provided also that when all the appeals, if any, so taken shall have been heard, and finally determined or disposed of in manner hereinbefore provided, the Commissioner of Valuation shall make out and transmit lists, in the form as aforesaid, of the tenements and properties so finally revised, to the guardians of the poor of the union, and to the town council of the borough, and to the treasurer of the county, in which respectively such tenements and properties are situate."

But, in my opinion, having regard to the repeal of the 29th

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and 30th sections of the Act of 1852, and the substitution for them of sections 4 and 5 of the Act of 1854, the class of persons now within the description of that 31st section must be deemed to be the owners and occupiers of tenements, the area or valuation of which shall have been altered under the Act of 1854. They, under this 31st section, have the same right of appeal to the Commissioner of Valuation and to the Recorder as is provided by the earlier part of the Act. Therefore, I do not think that the jurisdiction contended for by Mr. Fitzgerald under the second head of his able argument exists.

I now come to the last section upon which Mr. Fitzgerald relies as giving this jurisdiction, the 20th. "Should it appear to the said Commissioner of Valuation from such report that the valuation or statement of the area of the tenement or rateable hereditament referred to in any of such notices requires amendment, the Commissioner of Valuation shall have power to alter and amend the valuation or statement of the area of the tenement or rateable hereditament so appealed against, and also to alter and amend the valuation or statement of the area of any other tenement or hereditament *against which there shall have been no appeal*, but which may appear to him to be *similarly circumstanced* with those respecting which appeals have been made, in order to render the valuation of every tenement or hereditament comprised in such list proportionate and uniform."

That jurisdiction, undoubtedly, does exist; but, in my opinion, it has no application to the present case. I am of opinion that the premises in Grafton-street and Wicklow-street are not "similarly circumstanced" with those in Clarendon-street within the meaning of this section. The learned Recorder held that the limits of the tenements were altered by the communications that had been made so as to enable the Clarendon-street premises to communicate with those in Grafton-street and Wicklow-street, and that, therefore, all the premises were similarly circumstanced, in this respect that the areas of all had been altered. In my opinion, the areas of none of them have been altered. I am also of opinion that if the areas had been altered, the fact of the areas being altered would not make the premises "similarly circumstanced" within the meaning of section 20;

because it would come to this, that if the area of premises, say in Grafton-street, were altered, that would make premises the area of which had been altered, say in Fitzwilliam-square, "similarly circumstanced" with those in Grafton-street, and upon a notice for revision in reference to premises in Grafton-street you could alter the valuation of premises in another part of the city, in another ward, and in the possession of a different occupier, simply because the area of each had been altered.

My view of the meaning of the words "similarly circumstanced" is, perhaps, a larger interpretation than is given to them by the Recorder. My view is this. The appeal contemplated in this section, although in terms an appeal from the Commissioner of Valuation to himself, is in reality an appeal from a subordinate in the Valuation Office, whose conclusion the Commissioner of Valuation had adopted, to the Commissioner himself in order that he may personally consider it. In that personal consideration, which he is now, for the first time, bound to give, he may find that the principle of valuation adopted in reference to one of the tenements was wrong. For example, as I put it during the argument, he may find that a public-house was valued as if it were a private dwelling-house, and he may arrive at the conclusion—I do not say whether rightly or wrongly—that that principle was erroneous. My view of the section is that if upon that appeal he came to the conclusion that, in the valuation of all the public-houses in Dublin the same erroneous principle had been adopted upon which the valuation of the public-house that he had jurisdiction to alter had been calculated, that then, in order to make the valuation in Dublin of public-houses uniform and according to the same principle, he would be at liberty to bring in and alter the valuation of other public-houses, although no notice had been served in respect to them; but of course the occupiers of them would have a right to appeal to the Recorder, and it appears to be assumed that the direction to make public the list in the same way as the original lists are published is sufficient notice to the occupiers of the change. That is my view of the effect of the words "similarly circumstanced"; it is a wide interpretation; but I am unable to agree with the learned Recorder that the premises in the present case in Grafton-street

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and Wicklow-street were similarly circumstanced with the premises in Clarendon-street.

For these reasons, which I fear I have stated in too great detail, but I was anxious that the view I took should be accurately known, I am of opinion that the view of the learned Recorder was erroneous in two respects; first, in treating all the premises here as *one tenement* to be valued in its entirety, instead of dividing it into several tenements to be separately dealt with; secondly, I am of opinion that it was erroneous in permitting the alteration of the valuation of the premises in Wicklow-street and Grafton-street, or of any premises, save those in Clarendon-street, mentioned in the notice served by the Town Clerk. I am of opinion that, with those declarations of our opinion, the case ought to go back to the Recorder, because his duty will not have been discharged by the decision he has made. It will now be for him to consider the case *de novo*, and determine the valuation of the premises in Clarendon-street, treating each separate house, held under each independent lease, as a separate unit.

JOHNSON, J.:—

I agree. On the first question it appears to me plain that there must be a separate valuation of each tenement even though they all constitute one block. Upon the second question I am of opinion that the Commissioner's jurisdiction was confined to the Clarendon-street premises, and that the other premises do not come within the description of premises "similarly circumstanced" with those in Clarendon-street. It is not desirable to lay down absolutely a definition of the meaning of these words "similarly circumstanced": cases of complication may probably arise from time to time raising questions of nicety upon these words, and it is therefore better not to attempt at present to formulate any precise definition.

GIBSON, J.:—

As to the first point, I concur without hesitation. The construction of the word "tenement" adopted by the Commissioner, would defeat the statutory right of deduction which it would make impossible. Where the facts are not accurately known, the Com-

missioner must decide as to the area, &c., of the tenement; if his decision is erroneous it can be set right on appeal. In the absence of appeal his decision binds as to area, and is a good basis for a rate.

The second point is more doubtful. Section 30 of the Valuation Act of 1852 gave the Commissioner an original jurisdiction to value tenements not included in the lists. As the lists were prepared by persons over whom he had no control and who might make serious mistakes of omission, such jurisdiction was obviously expedient if not necessary. The section was repealed by the Act of 1854, and section 5 takes its place. If possible, it should be construed as giving the same jurisdiction. The earlier words of the section, I think, allow such a construction, as the revision is not, in terms at least, confined to the lists. The difficulty is caused by the subsequent reference to "premises so requiring revision," a phrase which at first sight, though not, perhaps, necessarily, appears to point to the lists mentioned in section 4. The Court is, however, bound by the opinion expressed by the Judges in the *Kildare Case* (1), which was not overruled by the Court of Appeal; and we must accordingly assume that the Commissioner has no original power to travel outside the lists. If so, the only power of valuing premises not on the revision lists is that conferred by section 20 of the Act of 1852, where there has been an appeal within section 31. This jurisdiction is limited to tenements similarly circumstanced with those under appeal. I think that if, when considering the appeal as to the Clarendon-street premises, considered as separate tenements, the Commissioner was of opinion that the Grafton-street premises, also considered as separate tenements, were similarly circumstanced, he could have made the valuation of the latter proportionate and uniform with the valuation of the premises the subject of appeal. But as the Commissioner proceeded on another ground, which was apparently wrong, I need not say anything more on the question.

J. G. T.

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The Commissioner of Valuation appealed (1).

Wright, S.-G., and *Vesey Fitzgerald*, for the appellant:—

We submit that the original jurisdiction conferred by sect. 20 of the Act of 1852 is unrepealed, and the Commissioner of Valuation had power to make a bulk valuation and fix a bulk rate. The repeal of part of a statute leaves the general law: *Attorney-General* v. *Lamplough* (2). Once a large business establishment, such as a shop, is made out of several houses, so as to form one entire whole, it is impossible to split it up again. If notice is given requiring the revision of premises which are treated as a separate rateable tenement, but which in fact are only part of a larger one, there is jurisdiction to value the whole. If the owner of a house occupy part of it, he is liable to be rated for the poor-rate for the whole, unless there be a distinct occupation of the rest by some other person: *Rex* v. *Inhabitants of St. Mary the Less* (3). A man carrying on business as a shopkeeper in one room of a house is liable to be rated for the whole: *Rex* v. *Inhabitants of Aberystwith* (4). In England the valuation required by section 4 of the Union Assessment Committee Amendment Act, 1864, is one giving the collective value of the hereditaments of each occupier: *Rawlence* v. *Hursley Guardians* (5).

We also submit that having regard to the words "similarly circumstanced" in section 20 of the Act of 1852, the Commissioner of Valuation had power to go outside the Town Clerk's list, and also "to alter the valuation of any other tenement."

Matheson, K.C., and *Henry Hunt*, for the respondents:—

The jurisdiction of the Commissioner of Valuation is derived solely from the statutes constituting the Valuation code. He has no original jurisdiction.

(1) In the Court of Appeal before LORD ASHBOURNE, C., and FITZGIBBON and HOLMES, L.JJ.

(2) 3 Ex. Div. 214, 223.

(3) 4 T. R. 477.

(4) 10 East, 354.

(5) 3 Ex. Div. 44.

On the true construction of sections 4 and 5 of the Valuation (Ireland) Amendment Act, 1854 (17 Vict. c. 8), the Act regulating the annual revision of rateable tenements and hereditaments, the Commissioner of Valuation has power only to revise the valuation of the rateable tenements or hereditaments set forth in the list of premises requiring revision received by him from the Town Clerk, with the opinion of the rating authority as to whether the same should be revised or not. This is decided by the King's Bench in *Reg.* (*County Council of Kildare*) v. *The Commissioner of Valuation* (1). The only premises mentioned in the Town Clerk's list of premises requiring revision are Nos. 1, 2, 3, 4, and 5, Clarendon-street; and the Commissioner of Valuation having gone outside the list, and dealt also with the appellants' premises in Grafton-street and Wicklow-street, valuing all *en bloc* as one rateable tenement, acted in excess of jurisdiction, and, therefore, the revised valuation is bad.

Again, in exercising his jurisdiction, the Commissioner of Valuation is bound under section 11 of the Valuation (Ireland) Act, 1852 (15 & 16 Vict., c. 63), to cause every tenement or rateable hereditament to be separately valued, and the word "tenement," for the purposes of the unit of valuation, means such premises only as are held under the same contract of tenancy from the same landlord. Therefore in abolishing the several separate existing valuations made according to separate tenements so defined, and making one lump valuation for all the premises as constituting one establishment, although held severally under separate contracts of tenancy for different terms, the Commissioner of Valuation acted without jurisdiction, and the revised valuation is void. Moreover, a separate valuation of each tenement, as already defined, is indispensably necessary to enable the occupiers to make the deduction for certain rates and taxes under the Poor Law Acts and the Local Government (Ireland) Act, 1898; for instance, poor-rate and income tax, while the public water-rate in Dublin is payable by the landlord. The Commissioner of Valuation has no original jurisdiction under section 20. The words "similarly circumstanced" refer, and are confined, to pre-

(1) [1901] 2 I. R. 215.

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mises in the list of premises requiring revision in respect of which no appeal has been taken against the primary valuation.

LORD ASHBOURNE, C. :—

This case, which comes before us on appeal from the King's Bench Division, raises important and interesting questions in reference to the Valuation code, a code that is not found in one Act of Parliament, but in a considerable number of Acts of Parliament, which make a large code requiring careful and attentive consideration. The well-known firm of Switzer & Co. had for a considerable time large premises, as every citizen of of Dublin knows, in Grafton-street, and these were also connected with other premises in Wicklow-street. The particulars of those premises in Grafton-street and Wicklow-street, and other premises that are at the back of the Grafton-street premises, are set out in abundant detail in the case stated by the Recorder. It appears that those premises which I have so indicated as being held in Grafton-street, at the back of Grafton-street, and Wicklow-street, are held under as many as nine different leases, and were valued as nine separate tenements, and that as far as I know for a considerable number of years. Although, structurally, they all communicated with one another, and formed one business establishment, they were still valued as nine separate tenements. Under the leases under which these premises are held the tenants have a right to deduct the annual proportion of poor's-rate and the income tax. In 1897 Switzer & Co. purchased the lessees' interest of certain premises described as 1 to 5, Clarendon-street, which were houses situate at the back of their premises in Grafton-street and Wicklow-street, and which were held in the way indicated in the case, *i. e.* under separate leases for a considerable number of years and at varying rents. Thus, No. 1 was held for sixty-one years, from 1853, at a yearly rent of £16; No. 2, for sixty years, from 1852, at a yearly rent of £16; No. 3, for one hundred years, from 1849, at a yearly rent of £16; No. 4, for sixty years, from 1852, at a yearly rent of £16; and No. 5, for sixty years, from 1851, at a yearly rent of £20. Prior to the purchases those houses at Clarendon-street were in the occupation of tenants, and each of the houses, 1 to 5, were valued separately.

Thus, Nos. 1 and 2 were valued each at £15; No. 3, at £14; No. 4, at £15; No. 5, at £17. The firm pulled down the houses, and erected on the site a large building facing Clarendon-street. These premises are, I assume, now complete. It is stated that a portion of the rere walls of the premises of Switzer & Co. in Grafton-street and Wicklow-street was removed so as to open access from the old premises to the new in Clarendon-street, there being no separation on the ground floor, but free access from one part of the shop to another. Then it is stated that, except for such removal, the premises in Grafton-street or Wicklow-street were not structurally altered, or their boundaries changed.

When the Clarendon-street premises had been erected, the rate-collector, in pursuance of section 4 of the Valuation Act, 1854, that has been so often referred to in the argument, put on his list of tenements or hereditaments requiring revision of valuation Nos. 1 to 5, Clarendon-street, and delivered it to the Town Clerk, and the Town Clerk transmitted the list to the Commissioner of Valuation, with the opinion of the Dublin Town Council that such revision was necessary. These were all necessary steps under the Valuation code to bring the matter before the Commissioner of Valuation, who is, of course, the important authority in whom is vested this very serious work of valuation. The Commissioner of Valuation, when he received this list dealing with the Clarendon-street premises in their new and altered form, struck out of the valuation lists the separate valuations of the premises in the occupation of Switzer & Co., and he valued the whole block of buildings in Grafton-street, Wicklow-street, and the new Clarendon-street premises, as one tenement, describing Switzer & Co. as occupiers, and Otway, Johnston, and others as immediate lessors, and he placed one bulk valuation on the entire premises, and he transmitted the list so revised to the Town Clerk. The bulk valuation so placed on the premises was the one undivided figure of £1900. Messrs. Switzer & Co. were dissatisfied, and by notice to the Town Clerk they appealed to the Commissioner of Valuation against such revised valuation on the ground that the same was not in accordance with the provisions of the Valuation Acts, and that

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it was excessive, having regard to the valuation of similar premises in the neighbourhood, reserving the right to add to, alter, or amend the appeal. The Commissioner of Valuation, on the hearing of the appeal, declined to alter the bulk valuation, and he transmitted to the Town Clerk the list unaltered as to such bulk valuation. The case the ncame by way of appeal before the Recorder, who heard it, apparently, with very great attention. Counsel for Switzer & Co., before the Recorder, submitted, in particular, two grounds of objection, though there were more on their notice. First, want of jurisdiction to revise the valuation of any premises except those included in the Town Clerk's list of premises requiring revision, namely, the Clarendon-street premises; and, secondly, that it was necessary, in accordance with the Valuation Acts, that each tenement should be separately valued; and, resting their case on those two grounds, they would not go into evidence impeaching the propriety of the valuation £1900.

In support of the first contention, counsel referred to sections 4 and 5 of the Valuation Act of 1854 (17 Vict. c. 8), and relied on the construction thereof put by the Lord Chief Baron in the case of *Reg.* (*Kildare County Council*) v. *The Commissioner of Valuation*(1), which came before the King's Bench on *certiorari*.

On the second point they referred to section 11 of the Valuation Act, 1852, viz.: "In every valuation hereafter to be made or to be carried on or completed under the provisions of this Act the Commissioner of Valuation shall cause every tenement or rateable hereditament, hereinafter specified, to be separately valued."

The learned Recorder, having heard the case fully argued and discussed, arrived at a conclusion on both points against Switzer & Co., and decided in favour of the Commissioner of Valuation. From that decision an appeal was taken to the King's Bench Division, where the Lord Chief Baron, Mr. Justice Johnson and Mr. Justice Gibson were sitting, and the judgment of the Court is contained in the following order:—"The Court is of opinion that the Commissioner of Valuation had not jurisdiction to revise the valuation of any of the tenements or hereditaments

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mentioned in the case, except those which were formerly known as Nos. 1, 2, 3, 4, and 5, Clarendon-street, and that in revising the valuation of such last-mentioned premises the tenements held under each separate lease ought to be separately valued; and, accordingly, the Court doth reverse the decision of the said Recorder, and doth remit this matter to the said Recorder to proceed therein as shall be just and in accordance with the above declaration." That, as its terms import, was a decision against what the Commissioner of Valuation had done, and a clear expression of the opinion of the Court that he erred in departing from the practice which had prevailed for a number of years, and that the case should, accordingly, be sent back to him. The principal judgment was delivered by the Lord Chief Baron, who went into the case with his usual clearness and his ripe legal knowledge. The Commissioner of Valuation appears to have applied himself to the case very much on what he saw before his eyes—a large block of buildings owned by one large and wealthy firm. He appears to have thought that it would be reasonable to apply, if the law permitted him, one valuation, without qualification, to one large block of buildings. I do not say that that might not be reasonable, and convenient, and desirable, if a man had to make a valuation according to his own opinion. But when there is a large Valuation code one cannot do that. Where there is such a code one must proceed, having regard to the light given by numerous Acts of Parliament which relate to this difficult and intricate subject, and also not a little, I should think it would be wise to be guided by what had been the practice for a great number of years in reference to similar classes of buildings. The Lord Chief Baron dealt with the two points that were discussed at such length, and rightly at such length, before the learned Recorder. The first that he dealt with was whether it was possible to disregard everything that had been previously done in reference to the valuation of these premises: that instead of treating each separate tenement as being entitled to have its separate valuation preserved, whether he could sweep away all the divisions that existed in the past, and that he could lump them into one consolidated valuation. The Chief Baron arrived at the clear conclusion, in which he was supported by

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his colleagues, that that could not be done at all. The Valuation code was inconsistent with it. Separate valuation is prescribed under section 11, supported by section 17, of the Valuation Act, 1852, on which he mainly rested his judgment, and deriving support also from the structure of the schedule referred to throughout, and which prescribes that the lessors should have their names recognised in a separate column. I agree entirely in the view of the Lord Chief Baron. It would be waste of time to go through the ample discussion and arguments referred to in the judgment. I take it as clear that each separate tenement is entitled to be separately valued for the interests of lessor and lessee, and, as pointed out by Mr. Matheson and Mr. Hunt, it would lead to a mass of confusion if a departure from the old practice were sanctioned. If the idea of having one valuation, regardless of all separation, were to prevail, it would lead to a considerable confusion in reference to the water-rate, possibly in reference to the income tax, and, for aught I know, some disturbance in reference to the franchise. So that on the first point I satisfy my judgment in saying that I entirely agree in the judgment of the King's Bench Division.

The only other ground I think it necessary to observe upon—indeed the only other ground discussed before the King's Bench Division—is that on which it is sought to contend that, although the list that was sent by the Town Clerk to the Commissioner of Valuation did not say a word about the Grafton-street premises, did not say a syllable about the premises in Grafton-street or Wicklow-street, and was absolutely confined in its terms to Clarendon-street, yet it can be used to revise the entire valuation of the Grafton-street and Wicklow-street premises. Of course that might have been the law if one can find warrant for it in an Act of Parliament. But the Lord Chief Baron said on a full review of the Acts which make up the code, no warrant for such contention can be found. Inasmuch as the list sent in by the Town Clerk dealt with the Clarendon-street premises only, it was not possible to widen it so as to give him jurisdiction to recast and revalue all the premises—to bulk Grafton-street and Wicklow-street premises with Clarendon-street and consolidate them into one substantial figure of £1900. The objection taken by Switzer & Co., was, "We

won't go into any question of convenience or what may be in the mind of anyone. We take our stand on the law, and we say there was no jurisdiction to go outside the list by the Town Clerk. Nothing warrants going outside Clarendon-street, and there was no jurisdiction to include Grafton-street and Wicklow-street." I am of opinion that that objection is well founded. I agree with the Lord Chief Baron, who, after discussing all the statutes, arrived at that conclusion. I can see no ground for giving the Commissioner any general original jurisdiction that would enable him to have a jurisdiction so wide and so far-reaching, and which might be used to work out very curious results in reference to properties that might never have been present to the mind of anyone when the original notice was served. Now, this jurisdiction must be found, if at all, in an Act of Parliament. The whole code, as I have said, implies very delicate considerations. There were many Valuation Acts before the Act of 1852: I think there were six or seven, and that Act was followed by the Acts of 1854, 1860, 1864, and so on—a great code all trying to work out one result. But they must be read very closely, with great attention, with very keen legal appreciation of all the points suggested on reading the code. And it is obvious that the whole jurisdiction of the Commissioner of Valuation is a creature of statute, and must be found in the statutes. When looked at in that point of view, with the highly trained legal mind and keen insight of the Lord Chief Baron, what does it all come to? That there were sections in the Act of 1852 that would have enabled the Commissioner of Valuation to go outside the lists, sections 29 and 30; but, as was pointed out by Mr. Matheson, and also by Lord Justice Holmes, where section 30 gave the Commissioner of Valuation power to go outside the lists, it said so in express and clear terms, whether they should have been included in said lists or not. Parliament in its wisdom, I suppose for reasons it thought adequate, repealed those sections, and substituted for them the 4th and 5th sections of the Act of 1854, which contain no such words: and therefore you have to look somewhere else than to the 29th and 30th sections that might have been relied on in the past. The 4th and 5th sections do not contain any words that would replace the

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jurisdiction contended for, and therefore the Commissioner of Valuation is driven here to rely on section 20 of the Act of 1852, that has been referred to so often in the progress of this interesting discussion. That section shows in the earlier part of it that the Commissioner of Valuation may inquire into the subject of the notice of appeal, and on the hearing of the appeal "he shall have power to alter and amend the valuation or statement of the area of the tenement or rateable hereditament so appealed from, and also to alter and amend the valuation or statement of the area of any other tenement or hereditament against which there shall have been no appeal, but which may appear to him to be similarly circumstanced with those respecting which appeals have been made, in order to render the valuation ef every tenement or hereditament comprised in such list proportional and uniform." That is a measured and a balanced statement giving a jurisdiction to meet an obvious convenience, but not intended to give a wide unmeasured and unbounded power of revision. We have been pressed here with the argument that we should regard what has been done in reference to the Grafton-street and the other premises as done because they were "similarly circumstanced" to the Clarendon-street premises. I cannot arrive at that conclusion. I do not think that that is what could have been intended by this section. I do not think that that would be a reasonable meaning to give it, and it does not commend itself to my judgment. I can conceive that it may have been right and wise that if matters comprised in the Town Clerk's list came up for examination in reference to particular premises in respect to which there was an appeal, it might be reasonable as to other premises comprised in such list, if they were found to be similarly circumstanced, for the Commissioner of Valuation to apply his mind to them. I do not think it would be reasonable under the circumstances, having regard to the statutory jurisdiction to which I have referred, that a list which comprised the Clarendon-street premises could be read in such a wide way as to justify legally what the Commissioner of Valuation has done here in reference to the premises comprised in this very considerable area. I agree with the decision of the King's Bench on the second point as on the first, and I also

substantially agree with what has been said by the Lord Chief Baron in his judgment on the second matter also. Therefore, the order of the King's Bench is correct, and should be affirmed.

FITZ GIBBON, L.J.:—

Of the two questions before us, the decision of the first is necessary; and on the appeal it is conclusive against the valuation. The second question calls for an answer, by way of precaution, to prevent doubt as to the view of the Court upon the matter. It is in that way that I understood the Lord Chief Baron to take up the second question after he had answered the first; and it is in that way that we are adding our contribution. But I am afraid that I cannot altogether agree in thinking that our construction of this part of the Valuation code will lead to all the consequences, or will involve all the conclusions, of my Lord Chief Baron, who seems to think that, under certain circumstances, the Commissioner of Valuation can annually revise the valuation of a very much larger number of tenements than I think he has any right to touch.

The first question is put in its most convenient form by the Lord Chief Baron—"What is the unit of valuation?" What is the smallest thing upon which the Commissioner of Valuation must put a figure when he is making either an annual revision or a general valuation, for the unit must be the same for both? The Act of Parliament calls the subjects of valuation sometimes "rateable hereditaments," and sometimes "rateable tenements": they are sometimes land, sometimes buildings, sometimes both, and sometimes other property.

The leading definition is to be found in section 12: "For the purpose of this Act the following hereditaments shall be deemed to be the rateable hereditaments, viz. all lands, buildings, and open mines, all commons, and rights of common," and other profits out of land which we need not detail. To my mind it is clear that a previously existing duty to value any piece of land as a distinct hereditament cannot be ended or altered by merely erecting buildings of a particular pattern, shape, or size upon it, while the title to it as land remains distinct. The fundamental error in the procedure of the Commissioner here

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is that he has taken it upon himself, for the first time, to treat several distinct rateable hereditaments—different plots of land—as having become one single "rateable hereditament" by alterations in the structure of the buildings erected upon them. The Valuation Acts recognize various interests in the same plot of land as material and necessary items of separate consideration. There are separate columns for "lessors" and for "occupiers." The "owner" is, in some statutes, contrasted with the "occupier." Those who have interests in occupation, and those who have estates not in occupation, are equally within the scope of the Acts.

What was the state of the Switzer property before this amalgamation took place? The map is before us. It contains fifteen distinct hereditaments, not merely rateable, but separately rated. Mr. Fitzgerald says that the Commissioner of Valuation cannot value part of a shop irrespectively of the rest. If he cannot, I am afraid that he must learn to do it as soon as possible, and he cannot make a better beginning than by seeing how his predecessors did it. Any difficulty in now valuing the building that fronts Clarendon-street is simplicity itself to what must have been surmounted when all the Grafton-street back premises, and parts that have no separate access to light or air, were separately valued. Up to 1900 they were separately valued rateable hereditaments, though many of them were intersected by counters, and some had no walls or other physical boundaries. Each and every one of them appeared on the rate-book with a separate value, and with a distinct owner or lessor. The owners, I have no doubt, found no difficulty in fixing a price or rent for each of them, and the Commissioner must fix a separate value likewise. The rights, and the liabilities, that depend on the exercise of the function of the Commissioner of Valuation do not stop with occupiers. Owners and lessors are also affected. Mr. Hunt has pointed out that in Dublin we have a rate assessed on the owner that does not touch the occupier at all. How is that rate to be assessed on, or apportioned among, "Otway, Johnson, and others"? What has become, under this wholesale valuation, of the individual rateability of the fifteen people who are to pay 3*d.* in the £1 for public water-rate? They and their hereditaments have been struck out. The Com-

missioner has no power to do that. He cannot mix up fifteen units, and make one valuation of a compound piece of property, belonging to fifteen different people, leaving to them the impossible task of sorting out the separate sums at which each of them is to assess himself. The unit of valuation is each separate rateable hereditament, and what is physically or structurally one hereditament is rateable in separate parts, if there are different lessors. Even property belonging to the same occupier and the same lessor may be divisible for the purposes of valuation, because it may include parts which the Acts direct to be separately rated, or which must be separately valued, because they are used for particular purposes. Furthermore, the Valuation Act provides for bringing before the Commissioner the rights, not of occupiers only, but of all persons affected. Section 19 enables "any person aggrieved by reason of the valuation of any tenement or rateable hereditament, or by reason of any inaccurate statement of area, or inaccurate description of any tenement or rateable hereditament contained in such lists, or any other cause whatever," to give notice of appeal. Therefore, on the face of the statute itself, any lessor can compel the segregation of his property from that of other people. The difficulty of the Commissioner of Valuation is not greater than that of a sheriff who might have to execute a *habere* for a bit of a shop; nor is it greater than that of jurors who constantly have to assess the value, under the Lands Clauses Act, of distinct interests in premises with confused boundaries. Again, the rights and liabilities of voters and jurors may depend on the separate valuation of hereditaments with different titles, though with confused or even common boundaries. All these considerations answer the first question and rule the appeal.

The second question remains. There being a successful appeal against the valuation of Switzer's premises as a whole, will the Commissioner, when the valuation goes back to him, have power to value each of the hereditaments now occupied by the firm? I have no shadow of doubt that, whenever he is acting under the Act of 1852, section 20, the Commissioner can revise the valuation of every single rateable hereditament within the area brought under his consideration. That section related

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to the first general valuation—"Griffith's Valuation"—and by reference it is applied to every future general valuation. The words "comprised in such list," where they occur at the end of section 20, when that section first came into operation, included every rateable hereditament in Ireland, and it appears clear to me that, whenever that section is applied again to any part of Ireland for the purpose of making a new general valuation, the words must have the same meaning; accordingly, wherever there is a general revision of valuation, the power, whatever it is, of dealing with "similarly circumstanced" premises, so as to make the valuation of all "proportionate and uniform," must extend to all the hereditaments in the place. But section 31 narrows the Commissioner's power for our present purpose: "The owners or occupiers of *all tenements the area or valuation of which shall have been altered as last aforesaid in the list signed by the Commissioner of Valuation* shall have the same powers of appeal to the Commissioner of Valuation and to the Quarter Sessions, subject to the same conditions and provisions, and exercised in the same manner and to the same extent as hereinbefore provided in regard to appeal." This legislation by reference drives us to find out how section 20 is brought into operation. Sections 29 and 30 enabled the Commissioner to go outside the tenements mentioned in the list; and, whether a tenement was included in the list or not, he might revise the valuation of it. But sections 4 and 5 of the Act of 1854 have been substituted for sections 29 and 30 of the Act of 1852, and I fully concur with my Lord Chief Baron, and with the Lord Chancellor, that the list mentioned in section 4 is now the foundation of the jurisdiction to make the annual revision. If so, the power on appeal, which by reference is still to be derived from section 20, can, in my opinion, be applied only to the subject-matter that is within section 4, viz.—to hereditaments which may be included in the list that is annually furnished. That list can contain only certain specified classes of property, viz.—property of fluctuating value, or which has been altered in structure boundaries or value.

Under the Act of 1852 three classes of property were subject to annual revision—1, property, the limits of which had been

altered, *or*, 2, property the value of which had changed, *or*, 3, property on which "buildings had been erected, or thrown down, or destroyed." These words disappeared from sect. 4 of the Act of 1854, and two classes only were substituted. Sect. 4 is open to two constructions, either that every year it shall be the duty of the local officer to send up a list of all the buildings in the place as being property "liable to frequent alteration," or to confine the list to those tenements only which have been altered in structure, boundaries, or value. The words are not grammatical: "A list of all the tenements or hereditaments situate within every townland in the said union, and within his district, the valuation of which tenements shall require revision for any of the reasons aforesaid, or in respect of any property, the annual value of which is liable to frequent alteration as aforesaid." This at least is clear, that no such thing has ever been done or contemplated in any city as to annually send up in the list for revision every building in the place. Those buildings only are sent up in the value of which there has been an alteration in the opinion of the officer who sends up the list, or to the valuation of which some ratepayer has called attention with a view to its revision. Under these circumstances, the annual revision is a comparatively easy and insignificant function. The Commissioner of Valuation is not to go about, of his own motion, revaluing every piece of property he chooses. He may annually revise any valuation upon the list to which his attention is called, but he is not to do anything more, except in the case mentioned in section 20, *i.e.* when a valuation is made disproportionate or not uniform by reason of something done on the revision, he may correct that. But I think that the field of his jurisdiction, under section 20 as well as under section 4, on these annual revisions, is limited to the class of property which is in the list sent up to him by the local authority on whom the duty is put of setting him in motion.

It is right that I should say, for myself alone, that if the Grafton-street premises of Switzer & Co. had been put upon this list, and if attention had been thereby called to the fact that the valuation of them required revision, I should have had no doubt that the Commissioner would have had jurisdiction to consider the effect upon their value of the newly-opened access

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to Clarendon-street, and to put a revised valuation upon them. He could not, however, do as he did; he could not "lump" them together: he was bound to value each of them separately.

HOLMES, L.J.:—

I can add nothing with profit to what has been said regarding the unit of valuation by the other members of the Court, and by the Lord Chief Baron in delivering the judgment of the King's Bench Division. The Acts relating to valuation in Ireland are merely ancillary to other statutes under which rates for various purposes are imposed and levied; and for the proper carrying out of some of these provisions it is necessary to assess separately every rateable tenement which the occupier holds as tenant to some other person. Accordingly it is to be expected that the Valuation code should provide for the separate valuation of all such tenements as aforesaid; and the Lord Chief Baron has demonstrated by reference to the forms prescribed by the Legislature that this has been done. I do not suggest if the Commissioner of Valuation were to group together, as he has done in the case before the Court, several leaseholds in the occupation of the same tenant, and bring out a single sum as the value of them all, that a rate assessed thereon would be illegal or void; but I have no hesitation in holding that such a mode of valuation may be successfully appealed against by either the occupier or the immediate lessor.

As regards the other question argued, I have already in both the *Belfast Case* (1) and the *County Kildare Case* (2) expressed the opinion that the Commissioner of Valuation has no jurisdiction to enter on an annual revision unless and until he is put in motion by the local authorities in the prescribed manner; but in the last-mentioned case I reserved for further consideration a matter which was not then discussed—whether, when so put in motion, the Commissioner had authority to go beyond the lists supplied to him. There would be nothing unreasonable in giving him a discretion in this direction; and the 30th section of the Valuation Act of 1852 undoubtedly did so in express terms.

(1) *Rex* v. *M'Cusker* — not yet reported — decided by the Court of Appeal, 29th June, 1901.

(2) [1901] 2 I. R. 215.

But this and the preceding section were repealed in 1854, and the 4th and 5th sections of the Act of that year were substituted therefor. These provisions differed in three or four essential particulars from those which they replaced, and one of the alterations is the omission of the discretionary powers to which I have referred. It is, I think, impossible, consistently with the language of the substituted sections, and especially having regard to the contrast between them and the repealed provisions, to hold that the Commissioner is not now confined to a revision of the valuation of the tenements contained in the lists furnished to him by the local authority.

I hold, moreover, that he is not only so confined when making his primary revision, but also when hearing appeals therefrom under the 20th section of the Act of 1852. That section is involved in a little confusion by reason of its being framed so as to discharge a double purpose. It relates primarily not to the annual revision, but to the original valuation, and in that case the lists mentioned in it are all the primary valuation lists prepared by the Commissioner; but the 31st section makes it also applicable to the annual revision, and when so applied the lists can only mean the lists supplied by the local authority as revised by the Commissioner. Therefore, when the section enacts in relation to the annual revision that on an appeal the Commissioner may alter the valuation of any tenement similarly circumstanced to that which is the subject of appeal, so as to secure uniformity in the list, he is not thereby authorized to go beyond the list supplied him for revision. The object is that his revision should be consistent with itself as regards the several tenements dealt with in it; but he has neither duty nor jurisdiction to alter or amend the valuation of premises which he has not been called on to revise.

Solicitor for the Commissioner of Valuation: *Sir P. Coll.*
Solicitors for Switzer & Co.: *William Fry & Son.*

R. D. M.

Appeal.
1901.
Feb. 11.

In re DONALDSON, a Bankrupt (1).

Husband and wife—Married Women's Property Act, 1882—45 & 46 *Vict. c.* 75, *s.* 3—*Separate estate lent or entrusted to husband for the purpose of his business—Bankruptcy of husband—Assets of husband—Wife's right to a deferred dividend.*

A married woman lent to her husband for the purpose of his business as hotel-keeper certain furniture to which she was entitled as her separate property. On the husband's bankruptcy his assignees claimed the furniture as his assets:—

Held, that the furniture was to be treated as assets of the husband.

In section 3 of the Married Women's Property Act, 1882, the words "other estate" are not to be read as meaning only property *ejusdem generis* with that indicated by preceding words "any money."

Appeal by Mrs. Helen Donaldson from the order of Boyd, J., made the 15th January, 1901, declaring certain furniture claimed by the appellant to be assets of the bankrupt.

The bankrupt, William Donaldson, married the appellant in the year 1883. He purchased an hotel at Bangor, in the county Down, in the year 1886, and carried on business there as hotel-keeper down to the date of his bankruptcy.

Some of the furniture in the hotel was admittedly the separate property of his wife (the appellant), who had purchased it with money forming part of her separate estate. The furniture so purchased was specified in a list or inventory which was given to the husband. The bankrupt and his wife lived in the hotel, the wife assisting in the management as housekeeper. Part of the furniture was used for the purposes of the customers exclusively, while part thereof was used at times for the purposes of the family of the bankrupt, and at times for the purposes of the customers, being in rooms which were occasionally occupied by the bankrupt and his family, and occasionally, when there was pressure of business, occupied by customers of the hotel.

(1) Before Fitz Gibbon, Walker, and Holmes, L.JJ.

The bankrupt insured all the furniture in the hotel, which included other articles besides those claimed by the wife, in his own name, and paid the premiums.

William Donaldson was adjudicated a bankrupt on October 23, 1900, and the messenger went into possession. The wife then claimed the furniture.

By the order appealed from it was declared that the furniture in question should be treated as assets of the husband's estate.

Ignatius O'Brien, K.C., for the appellant.

R. Doyle, for the assignees.

FITZ GIBBON, L.J.:—

Mr. O'Brien has put his views very clearly before us, but we cannot see our way to differ from the decision of Boyd, J. Unless this case comes within the Married Women's Property Act, 1882, section 3, I cannot imagine any case that would do so. The section says:—

> "Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of his wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."

Mr. O'Brien suggested that the words "money or other estate" applied only to property *ejusdem generis* with money. But throughout the Act "estate" is used in the widest sense, and it includes all property. Sect. 1 prescribes how a married woman can acquire, hold, dispose of, or bind her "separate *property*"; sect. 4 makes property appointed under a general power liable to her debts "in the same manner as her separate *estate* is made liable under this Act." Again, in sect. 7, "separate estate" and "separate property" are used as convertible terms. The provision in sect. 3 itself, that the wife is to rank after the creditors for a dividend for the "amount of . . . such *money*" or "the value of such . . . other *estate*," shows that "estate" includes property

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requiring valuation, as distinguished from liquidated or ascertainable amounts of money or of money's worth, for the purpose of calculating dividends, and, in my opinion, the word "estate" includes the class of property now in dispute.

The question remains whether this property was "lent or entrusted to the husband for the purpose of his trade or business." The wife made out a list of the furniture which she had purchased, and she gave that list to her husband. All the property now in question was included in that list. All this furniture was her property, but she put it into her husband's hands, in the hotel where he was carrying on his business, in which furniture was used. What was the purpose of the loan? As to the furniture which was in the rooms used ordinarily by the customers of the hotel, I cannot see how it can fail to come within the section if any property can ever do so. As to the furniture in the two rooms into which customers occasionally went, but which were at other times used by the family, including the bankrupt's wife herself, it is merely a question of fact whether this furniture was, or was not, "lent for the purpose of his trade." The lending must have been something which transferred, at some certain time, the custody and possession to the husband, and here this took place when the list was made and the furniture was handed over to him. Are we as jurors to infer that there was a fresh lending, a distinct transfer of the possession of this furniture, or a different purpose, on each occasion when guests came in or went out of these rooms, or when the family left or resumed the use of them? I cannot think so, especially having regard to the fact that all the furniture was included in the same list, and was "lent or entrusted" in the same way and at the same time. I find, as a fact, that the use by the family of the furniture in these two rooms was subsidiary to their use by customers of the hotel. The furniture was in the possession of the husband, to be used for the purpose of his business as a hotel-keeper whenever required for that purpose; and the family used it only when not so required. The assignees have not claimed the furniture which really and substantially was used by the wife or her family for private purposes.

There is an analogy between property coming within sect. 3 and property "in the order and disposition of a bankrupt." Both

must have passed into the possession of the bankrupt without becoming his property. We must here assume that, notwithstanding the relation of husband and wife, and notwithstanding the continuance of *ownership* in the wife, there was an interest—or apparent ownership—in the property, which was created by her parting with the possession, and on which the section fastened, so as to entitle the assignees to treat the furniture as assets of the husband.

Mrs. Donaldson having entrusted this property to her husband for the purpose of his business, must take the consequence of falling within section 3. Parliament has made a compromise, and she can claim a dividend as a deferred creditor; she is postponed to creditors for value; but I think she may take priority over volunteers, though, possibly, she may have to rank *pari passu* with claimants under family agreements. But we are not now in a position to decide more than the priority of creditors for "valuable consideration in money or money's worth."

WALKER, L.J.:—

I concur. Sections 1 and 2 of the Act of 1882 give new rights to married women, and section 3 sets a limit to some of those new rights, which it was not unreasonable to impose. In construing this section we must remember that "estate" is a large word with quite as wide a signification as "property." In section 4 the words "separate estate" are used as an equivalent for "separate property" in section 2. In the 3rd section itself the direction that the value of the "estate" of the wife lent by her to her husband for the purpose of any business carried on by him is to be ascertained for the purpose of a postponed dividend shows that there is nothing to confine the word "estate" to money or property *ejusdem generis*. The postponed dividend is expressly directed to be calculated on "the amount" of the *money* and on "the value" of the *other estate* lent by the wife.

The effect of the section is, therefore, to make property of the wife entrusted to the husband for the purpose of his business become part of his estate, subject to this right of a postponed dividend. If it did not apply to the facts of the present case, the section would apply nowhere.

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Holmes, L.J. :—

I am of opinion that the statement in Mr. Griffith's text-book that the third section of the Married Women's Property Act, 1882, is an order and disposition clause is calculated to mislead. It seems to me to be a new provision in bankruptcy law called into existence in consequence of the new rights conferred upon a married woman by this statute, and its meaning must be ascertained by reference to its own language, which is, I think, very clear. It contemplates two things—the wife either lending her money or entrusting her goods to her husband for the purpose of his trade and business. How in the case before us did the wife's furniture come into the hotel? Part of it she brought there from her previous residence reluctantly. She would rather not have had it in the hotel at all; but, as it was required for the business which her husband was about to carry on there, she entrusted it to him. The rest she actually purchased for the purpose of his business. If she had lent him the money to buy it, it certainly would have been within the first branch of the section; and it is within the second when she made the purchase herself and allowed him to use the goods.

Whether the furniture in the two sittingrooms are captured by the section depends on a question of fact. The furniture in the private rooms used exclusively by the lady and her husband for their own residence and comfort would not be dedicated to the trade and business in any sense; and it is admitted that this was so in the case of three of the bedrooms. I am, however, satisfied that the two rooms in question were intended for guests, and let to guests when required. They were, in fact, the only sittingrooms in the hotel available for guests who did not desire to use the public rooms. No doubt they were not always so occupied; and at such times the host and hostess might have used them as they might have used any unoccupied bedroom or other apartment in the house.

Solicitors for the appellant: *H. C. Neilson & Son.*
Solicitor for the respondents: *W. V. Seddall.*

G. Y. D.

QUINN *v.* M'KINLAY (1).

(1895. No. 12437.)

K. B Div.
1901.
Nov. 14, 29.

Practice—Costs—"Recover" in the action "a sum less than £20"—General Order LXV., Rule 4—Common Law Procedure Act, 1856, sect. 97.

In an action of contract to recover £23 1*s.* 6*d.* the defendant paid the plaintiff after action brought the sum of £5, and pleaded it in the statement of defence as a payment on account of the sum claimed in the action. The jury, at the trial, found a verdict for the balance—£18 1*s.* 6*d.*—which the Judge certified in his certificate was exclusive of the £5 which had been so paid after action brought, and had been referred to as such in the pleadings. Judgment was entered for £18 1*s.* 6*d.*, with costs, and the contents of the Judge's certificate were set forth on the face of the judgment. The parties resided within the jurisdiction of the Civil Bill Court of the county in which the cause of action had arisen:—

Held, that inasmuch as it sufficiently appeared on the files of the Court, from admission in the pleadings, from the Judge's certificate, and on the face of the judgment, that the £5 had been obtained by force of the action, the plaintiff had "recovered" not "less than £20" in the action within the meaning of sect. 97 of the Common Law Procedure Act, 1856, and of Order LXV., Rule 4, and was entitled to the costs of the action.

ACTION by the Rev. Walter Buchan, Thomas C. Quinn, and Thomas Quinn, against Andrew M'Kinlay, senr., and Andrew M'Kinlay, junr., to recover a sum of £23 1*s.* 6*d.*, the balance due on foot of a promissory note. The action had been commenced in 1895, and when it came on for trial in March, 1900, the original plaintiff and the original defendant were both dead, and the above-named parties were their personal representatives, respectively. The writ was issued on the 2nd December, 1895, and on the 7th January, 1896, the defendant handed to the plaintiff a receipt signed by the defendant's mother for a sum of £5 due to her by the plaintiff, which was accepted by the plaintiff as a cash payment on foot of the amount of £23 1*s.* 6*d.*, which had been claimed in the writ of summons. On the 28th May, 1896,

(1) Before BARTON and WRIGHT, JJ.

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judgment was entered in default of appearance for the sum of £18 1*s.* 6*d.*, which judgment was afterwards set aside upon the application of the defendant on the ground of surprise. In the 3rd paragraph of the statement of defence the defendant pleaded the payment of £5 as a payment after action brought on account of the sum sought to be recovered in the action. The case came on for trial on the 22nd March, 1900, before Mr. Justice Andrews and a jury, at the Londonderry Assizes. At the trial the payment of the £5 after action brought was not disputed, and the jury found for the plaintiff for the balance, £18 1*s.* 6*d.* The learned Judge declined to certify that the case was a fit case to be tried in the Superior Courts, but, on the application of plaintiff's counsel, he certified in his certificate that the jury had found for the plaintiff for £18 1*s.* 6*d.*, exclusive of the sum of £5 paid after the issue of the writ, being the £5 referred to in the 3rd paragraph of the statement of defence. Judgment was given for the £18 1*s.* 6*d.* with costs against the defendants. The contents of the Judge's certificate were set forth on the face of the judgment. Both the plaintiffs and the defendants resided within the jurisdiction of the Civil Bill Court in which the cause of action had arisen. The Taxing Master allowed the full costs of the suit, as the plaintiffs had recovered more than £20. The defendants appealed from this on the ground that the plaintiffs had recovered only £18 1*s.* 6*d.* in the action, and were not entitled to any costs.

Leech, for the defendants :—

The plaintiffs have recovered in the action a sum less than £20 within the meaning of Order LXV., Rule 4. To entitle themselves to costs the plaintiffs should have recovered by verdict judgment or order in the action a sum not less than £20.

[He referred to *Ashcroft* v. *Foulkes* (1); *Beard* v. *Perry* (2); *Bradley* v. *Archibald* (3); *Donnelly* v. *Coyne* (4); *Dixon* v. *Walker* (5); *Savage* v. *Lipscome* (6); General Order LXV., Rules 56, 57, and 58; and General Order XXIV., Rule 3.]

(1) 18 C. B. 261.
(2) 31 L. J. Q. B. 180.
(3) [1899] 2 I. R. 108.
(4) [1901] 2 I. R. 7.
(5) 7 M. & W. 214.
(6) 5 Dowl. 385.

Horner, for the plaintiffs, *contra* :—

The £5 as well as the £18 1*s.* 6*d.* must be taken as having been recovered in the action, as it was obtained under compulsion of the writ.

[He referred to *Parr* v. *Lillicrap* (1); *Hughes* v. *Guinness* (2); *O'Rorke* v. *M'Donnell* (3); *Palmer* v. *Garrett* (4); *Fewster* v. *Boggett* (5); *Crosse* v. *Seaman* (6).]

Nov. 29.

Barton, J. :—

This case comes before us on a motion on behalf of the defendants to review taxation. The Taxing Master has given the costs of the action to the plaintiffs. The defendants contend that the plaintiffs are disentitled to costs, because the parties reside within the same civil bill jurisdiction, and the plaintiffs have recovered a sum less than £20. It is conceded that the parties reside within the same civil bill jurisdiction, and the only question for our determination is whether the plaintiffs have "recovered" a "less sum than £20" within the meaning of Order LXV., Rule 4, which is identical with section 97 of the Common Law Procedure Act, 1856.

It appears that this action commenced nearly six years ago, and that the original plaintiff and defendant are both dead, and that the present parties are their personal representatives. The plaintiff, in his writ of summons, originally claimed £23 1*s.* 6*d.*, balance due on foot of a promissory note; and it is admitted that the whole of that sum of £23 1*s.* 6*d.* was due by the defendant to the plaintiff at the date of the commencement of the action. After the issuing of the writ the defendant handed to the plaintiff a receipt signed by the defendant's mother for a sum of £5 due to her by the plaintiff, which the plaintiff accepted as cash paid on foot of the claim in the action. Subsequently, in default of appearance, judgment was marked in May, 1896, for the balance, £18 1*s.* 6*d.* On the application of defendant this judgment was set aside on the ground of surprise, and afterwards, for nearly four years, the defendants staved off the recovery of this balance. A

(1) 1 H. & C. 615.
(2) 4 Ir. C. L. R. 314.
(3) 13 Ir. C. L. R. App. viii.
(4) Ir. R. 5 C. L. 412.
(5) 9 M. & W. 20.
(6) 11 C. B. 524.

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statement of claim and statement of defence were filed. The defendants, in addition to sundry other defences, pleaded in the 3rd paragraph of their statement of defence, with reference to this sum of £5, that it was paid to the plaintiff since the issue of the writ of summons in respect of the amount sued for therein. Issue was joined automatically on the statement of defence, and the action came on for trial on the 22nd March, 1900, before Mr. Justice Andrews and a jury, at the Londonderry Assizes. At the trial the payment of the £5 after action brought was not disputed, and the jury accordingly found for the plaintiff for the balance, £18 1*s.* 6*d.* The learned Judge declined to certify that the action was one fit to be tried in the High Court; but on the application of plaintiff's counsel, and with the object of raising the question which now comes before the Court, he made the following reference in his certificate to this transaction about the £5:—"I certify that . . . the jury found for the plaintiff for £18 1*s.* 6*d.*, exclusive of the receipt by the defendant's mother for the sum of £5 handed by the defendant to the plaintiff, and by him taken as cash after the writ of summons was issued in this action, being the payment of £5 referred to in the 3rd paragraph of the defendant's statement of defence." The Judge gave judgment for the plaintiffs for £18 1*s.* 6*d.*, with costs. The judgment, which was entered in the office on the 6th April, 1900, fully recited the Judge's certificate in the terms which I have quoted, and then proceeded:—"Therefore it is adjudged that the plaintiff recover against the defendant £18 1*s.* 6*d.* and his costs of suit on taxation." No objection has been raised to the form of the Judge's certificate or of the judgment.

I think I have mentioned all that is material of the facts and history of this case, which seems to present the following question for our determination. We have a verdict and judgment for only £18 1*s.* 6*d.*, *i.e.* for a less sum than £20. On the other hand, we have it admitted on the pleadings, certified by the Judge, and recorded on the face of the judgment, that there was, at the date of the issuing of the writ, due to the plaintiffs by the defendant a sum of £23 1*s.* 6*d.*, and that since the issuing of the writ the plaintiff has obtained by force of the writ the sum of £5, which represents the difference between the amount that was due at

the date of the issue of the writ and the amount of the judgment. *Prima facie*, and apart from statutory exception, a successful plaintiff is entitled to his costs which follow the event, and *prima facie*, unless disentitled by statute, this successful plaintiff is entitled to his costs of suit. But this rule, copied as it is from section 97 of the Common Law Procedure Act, 1856, provides that in an action of this kind, and which comes to us in the shape in which this action comes to us, the plaintiff shall "not be entitled to any costs" if he shall "recover" a "less sum than £20." Accordingly the case seems to turn on the meaning of the word "recover" in this section and in this rule. If nothing can be regarded as "recovered" which has not been obtained by verdict or judgment or order, the plaintiff is disentitled to costs. If money obtained by force of the action may be regarded as "recovered" in the action, and if it sufficiently appears that this £5 was obtained by force of the action, the plaintiff has recovered not less than £20, and is not disentitled to costs.

The foundation of Mr. Leech's argument in support of this motion was the proposition that nothing can be regarded as "recovered" unless it has been obtained by verdict or judgment or Judge's order. But there are no such restrictive words in this section or in this rule, and some of the cases, on which Mr. Leech relied, were decided on the construction of statutes in which the word "recover" is accompanied by restrictive words, as in Lord Denman's Act, 3 & 4 Vict. c. 24, sect. 2, where the words are "recover by the verdict of a jury." On the other hand, the word "recover" has received in modern cases a somewhat wide interpretation from time to time. For example, in *Haines* v. *Welch and Marriott* (1) Willes, J., said at p. 93, in construing the word "recover" in section 1 of the English Landlord and Tenant Act, 1851, that it was "true that in strict legal language recover means recover by action. The Court might at one time have so construed it in a case like the present, but it is now often used in the larger sense of obtaining in any legal manner, and that is the sense in which it should be interpreted here."

But we need not go outside the cases which have turned on the

(1) L. R. 4 C. P 91.

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meaning of the word "recover" in statutory provisions, which, like this section 97 of the Common Law Procedure Act, 1856, and this Rule 4 of Order LXV., are concerned with the regulation of the costs payable in action by reference to the amounts recovered in them. Such cases, some of which were cited in argument, are very numerous and not always consistent with each other. Many of them have little or no application to a case like the present one. For example, this is a claim for a liquidated sum which was all admittedly due at the date of the commencement of the action, as appears on the face of the judgment, and consequently it bears no relation to a case like *Emery* v. *Binns* (1), where the plaintiff in an action of trespass claimed £3000 damages, and obtained a verdict for 40*s.*; and the Privy Council held, on the words of a Jamaican statute, that the sum recovered by the verdict and sanctioned by the judgment and not the sum laid in the declaration was the test to be applied in such a case in ascertaining the plaintiff's right to Supreme Court costs. For similar reasons this case is distinguishable from the cases in which the amount claimed in the action is reduced by set-off, because in cases of set-off the amount recoverable at the commencement of the action is only the excess of the plaintiff's liquidated demand over the defendant's liquidated cross-demand. Again, I do not think we can hope to derive much assistance in this case from cases like *Myers* v. *Phelan* (2), which turned on the fact that there were several separate causes of action, or from cases like *Donnelly* v. *Coyne* (3), which was a case of detinue, where the goods were returned after action brought, and where, as Fitz Gibbon, L.J., said, "the action cannot last longer than the cause of action."

But I think that there are cases from which we may derive considerable assistance—cases of single liquidated demands, in which a defendant lodges money in Court with a plea of tender, or with a defence of payment into Court, and then goes to trial and is beaten on the issue of sufficiency. It seems to me that the reasoning of the Court in some of these cases, to which I propose to refer, is favourable to the argument of the plaintiffs in the present case.

(1) 7 Moore, P. C. 196. (2) 26 L. R. Ir. 218. (3) [1901] 2 I. R. 7.

In *Rorke* v. *M'Donnell* (1) it was held that where the plaintiff recovered only £8 by verdict, but the defendant had lodged £45 in Court with a plea of tender, the plaintiff was under this section 97 of the Common Law Procedure Act, 1856, entitled to his costs of action. The principal reason of the decision seems to have been that more than £20 was due to the plaintiff when the action commenced. The following passage from the judgment of Lefroy, C.J., at p. 31, presents a view of the section which, I think, is favourable to the plaintiff's argument in the present case:—"Taking the language of the section in its strictest sense against the plaintiff, can we suppose that the Legislature meant anything else than this, that the party who should appear to have had, really and truly, *at the time when he brought his action*, a demand at least amounting to £20, should not be precluded from the benefit of trying any question between him and his adversary upon such a demand in the Superior Courts?"

Another case which supports the plaintiff's argument here is *Parr* v. *Lillicrap* (2), which in one sense was a converse of the present case. The plaintiff in that case only sought to recover £12 5*s*. 6*d*. The defendant paid the whole amount into Court, and the plaintiff took it out in satisfaction. Accordingly the plaintiff had obtained by his action less than £20, but the argument on his behalf was that he was not disentitled to costs because the money had not been "recovered" in the action, not having been obtained by verdict or judgment, but by payment into Court. However, the Court of Exchequer (consisting of Pollock, C.B., Martin, C.B., and Bramwell, B.) rejected this narrow construction of the word "recover." Pollock, C.B., at p. 617, said:—"The case put by my brother Bramwell shows what is the meaning of the word 'recover' in the 13 & 14 Vict. c. 61, s. 11 (the English County Courts Act). It does not mean recover by verdict or judgment, but obtain by means of the suit."

The only other case to which I think it necessary to refer on this branch of the case is *Hughes* v. *Guinness* (3), where in an action on a special contract £6 was lodged in Court, and a verdict was given for a further sum of £16. The case turned on the

(1) 13 Ir. C. L. R. App. viii. (2) 1 H. & C. 615.
(3) 4 Ir. C. L. R. 314.

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243rd section of the Common Law Procedure Act of 1853 as to half costs. Monahan, C.J., delivered the judgment of the Court, in the course of which he used words which seem very applicable to this case—"Now the question is, has the plaintiff, according to the true construction of the section, recovered less than £20? It has been argued that whatever the facts may be which prevent a plaintiff from getting judgment for £20, if in point of fact he has obtained judgment for a sum less than £20, he is only entitled under the 243rd section of the Common Law Procedure Act to half his ordinary costs. That astute argument goes this length, that, although the plaintiff should get everything which he seeks by his summons and plaint, being an amount over £20, still he ought not to get his full costs, because part of the sum recovered was money lodged in Court, and part was recovered by the verdict of a jury. We are of opinion that such a view is not in accordance with the true construction of the Act. We think that the meaning of the 243rd section is that if the plaintiff in an action of contract recover *by force of his action*, whether by the verdict of a jury or not, a sum not less than £20, he is entitled to his full costs of suit. And, accordingly, in the present case the plaintiff is so entitled." Ball, J., in concurring, added some pertinent observations, as to which Fitz Gibbon, L.J., said in *Myers* v. *Phelan* (1): "Ball, J., in *Hughes* v. *Guinness* (2), gave a cogent reason for so holding, when he pointed out that otherwise every defendant might take discount off his just liability by lodging such sum as would render it impossible for the plaintiff to recover over and above the sum lodged enough to carry costs." It seems to me that these judgments are fairly applicable to the present case, and justify us in holding that this £5 was recovered in the action.

Mr. Leech argued that these cases about money lodged in Court are not applicable to a case like the present, where the money was paid outside of Court from hand to hand. He challenged Mr. Horner to cite any case in which money paid from hand to hand has been held to be "recovered" in the action, and the challenge was not taken up. On the other hand, no case was

(1) 26 L. R. Ir. at p. 249. (2) 4 Ir. C. L. R. 314.

cited in which the fact that money paid from hand to hand had been recovered by force of the action appeared, as it does in this case, clearly and indisputably on the files of the Court. After all, if the test is that the money was obtained by force of the action, there seems to be no real distinction in principle, and only very slight difference in form between cases of payment into Court and the present case. If this £5 had been lodged in Court, the form of the judgment would have been that the plaintiff do recover £18 1*s.* 6*d.* "over and above" the £5 lodged in Court; while in the present case it appears on the face of the judgment that the plaintiff has recovered £18 1*s.* 6*d.*, "exclusive of" the sum of £5 paid after action brought. If the fact that this £5 was recovered by force of the action did not appear on the files of the Court by admission in the pleadings, by the Judge's certificate, and on the face of the judgment, the case might be different, and the Court might not have the materials which in this case enable us to hold that this £5 was recovered by force of the action. It is in this respect that this case presents a novel question for our determination, and I rest my judgment on the materials which I find on the files of the Court. I may observe that no objection has been taken to the judgment in point of form, and it has not been contended by Mr. Leech that, in respect of the reference on the face of the judgment to this payment of the £5, the judgment is irregular or open to exception.

Upon the effect of money being paid by defendant to plaintiff after action brought, Mr. Horner, for the plaintiffs, relied very strongly on *Fewster* v. *Boggett* (1). That was an action for debt. The defendant paid £19 12*s.* 8*d.* into Court. It appeared at the trial that the defendant had paid to the plaintiff a further sum of £13 after action brought. Lord Denman, C.J., who was the Judge, refused to certify that the case was a fit case for the Superior Courts, but entered a verdict for the £13, the plaintiff undertaking to issue execution for the costs only. That is a useful case for the plaintiffs here, because it shows that the Court regarded both money paid after action brought and money lodged in Court as money recovered in the action. But that case does

(1) 9 M. & W. 20.

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not seem to carry the plaintiffs here all their way. Verdict and judgment were entered in that case for the £13. If verdict and judgment had been entered for the £5 as well as for the £18 1*s.* 6*d.* in the present case, it would be a much simpler case. The whole difficulty of the present case arises from the fact that the £5 is not included in the amount of the verdict or judgment. However, *Fewster* v. *Boggett* (1) shows that the Court were of opinion that the plaintiff ought not to be deprived of his costs in such a case. Lord Denman worked out what he considered to be the proper result by entering a verdict for £13 for the purposes of costs only, but not for the purposes of execution, and Parke, B., intimated that if the verdict for £13 were set aside, the Court would take care that justice should be done. If "recover" means obtaining by force of the writ, and has not the restricted meaning of obtaining by verdict or judgment, or order, then I think we have on the files of the Court the materials to do, what Parke, B., intimated that the Court would, if necessary, do in that case, namely, work out in a somewhat different way the same result as that which was worked out by Lord Denman in *Fewster* v. *Boggett* (1).

This view, that "recover" in this section and rule means obtain by force of the action, and that a plaintiff may be entitled to the costs of the action, if it sufficiently appears that "not less than £20" was obtained by force of the action, is supported by the terms of Rules 56, 57, and 58 of the same Order LXV., under which in all cases of liquidated demands, when the debt is wholly or partially paid after the service of the writ, and judgment is marked in default of appearance or after motion for final judgment, it is the practice to allow the plaintiff the full costs, as if he had recovered the amount which was due to him at the time of the service of the writ. These rules must have been framed and this practice must have been settled with due regard to section 97 of the Common Law Procedure Act, 1856, and to the case of *Lapsley* v. *Blee* (2), which decided that section 53 of the Judicature Act, by means of the saving clause in brackets, which was inserted in consequence of the English

(1) 9 M. & W. 20. (2) 6 L. R. Ir. 155.

decision in *Garnett* v. *Bradley* (1), preserves in full force section 97 of the Common Law Procedure Act. I infer that the framers of the Rules 56, 57, and 58 of Order LXV. were of opinion that the word "recover" in section 97 of the Common Law Procedure Act might include money paid by defendant to plaintiff by force of the writ after action brought. Under these rules in case of default of appearance or final judgment, the plaintiff in this case could have entitled himself to full costs by filing an *ex parte* affidavit to the effect that this £5 had been paid since action brought, and it seems reasonable and conformable to this practice, that when the defendant has prolonged the proceedings by continuing to the end an unsuccessful resistance to the plaintiff's claim, the plaintiff may be entitled to costs, where it appears on the files of the Court, as it does in this case, from admissions in the pleadings, from the Judge's certificate, and from the judgment itself, that more than £20 has been obtained by force of the writ.

Mr. Leech has further argued that his plea of payment contained in paragraph 3 of his statement of defence was a defence arising pending the action, which the plaintiffs might under Order XXIV., Rule 3, have confessed, and that they might then have signed judgment for costs (if any) up to date, and he contended that, as plaintiffs, instead of doing so, allowed issue to be joined automatically on all the defences, including this one, and went to trial thereon, defendants have become thereby entitled to the costs of an issue on which they were successful. But the answer to this ingenious argument is, I think, that this plea is a mere plea of payment on account. It is not a substantive defence to an action or a cause of action such as is contemplated by Order XXIV., Rule 3. It is not a defence releasing or discharging a separate claim or cause of action. It would have been difficult to plead otherwise on behalf the defendant, or to separate this £5 from the rest of the claim in the action so as to make it the subject of a separate and substantive defence. This was an action brought on foot of a single demand arising out of one entire contract, and was not an action brought on foot of two or more distinct

(1) 3 App. Cas. 944.

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demands or causes of action. In this respect this case differs from cases like *James* v. *Vane* (1), in which there were two distinct demands in contract, and *Myers* v. *Phelan* (2), in which there were several distinct causes of action in tort. There is nothing in the facts of this case or in the pleadings to separate this £5 from the rest of the plaintiff's claim, or to make the payment of it a matter of separate and substantive defence. If Mr. Leech had pleaded, and got a finding of the jury in favour of a release or discharge of a separable part of the plaintiff's claim, he might be in a different position. The question whether a payment amounts to a discharge or a mere payment *pro tanto* on account is a question of fact which may be raised by a pleading and submitted to a jury: see *Goodwin* v. *Cremer* (3), and observations of Willes, J., in *Tetley* v. *Wanless* (4). There is no plea or finding of the kind in this case. This third plea is a mere plea of payment on account very properly pleaded so as to enable the defendant to prove a payment which he might be otherwise precluded from proving. By allowing issue to be joined automatically on that plea the plaintiff may have incurred liability for the expense of any witnesses rendered necessary for the purpose of proving that payment, but it does not, I think, enable or throw any obligation on the plaintiff to confess it, so as to deprive himself of the costs to which he would otherwise be entitled. Indeed, I think that it would be more reasonable to regard the verdict of the jury for £18 1*s.* 6*d.*, having regard to the pleadings, as involving a finding of the jury on the third plea that this £5 was paid by force of the action. If the jury had found by their verdict that the £18 1*s.* 6*d.* was exclusive of the sum of £5 obtained by force of the action, would not the plaintiffs be entitled to their costs? Does not the verdict explained by the pleadings and the Judge's certificate really amount to a finding of that kind?

Accordingly, for all these reasons, I think that it sufficiently appears on the files of the Court, by reference to the pleadings, the certificate of the Judge, and on the face of the judgment itself, that this sum of £5 was obtained by force of the action. That being so, it may and, in my opinion, ought to be regarded as

(1) 2 Ell. & Ell. 883.
(2) 26 L. R. Ir. 218
(3) 18 Q. B. 757.
(4) L. R. 2 Ex. at pp. 280, 281.

money recovered in the action within the meaning of sect. 97 of the Common Law Procedure Act, 1856, and of LXV., Rule 4, and the Taxing Master was right in so treating it, and in awarding to the plaintiff the costs of suit.

I wish to add, in conclusion, that my judgment is strictly limited to the case which we have under our consideration—namely, the case of an action brought to recover a single liquidated amount, in which it appears indisputably on the files of the Court, and recorded without objection on the face of the judgment, that a sum not less than £20 was due and recoverable at the date of the commencement of the action, and that a payment was, after the commencement of the action, obtained by force of the action, thereby reducing the amount of the verdict to less than £20; and I must not be understood as expressing an opinion as to the effect on the costs of suit of a payment after action brought in other classes of actions, or in cases where the payment cannot be identified and verified in the clear and sufficient way in which we have this "payment by force of action" verified and identified by the pleadings, the Judge's certificate, and the judgment.

WRIGHT, J.:—

Mr. Leech has argued that General Order XXIV., Rules 1 and 3, applies to this case, and that the plaintiff could have marked judgment and got costs for the £5. In my opinion that contention is erroneous. The defence contemplated by those rules is a defence going to the whole action, and they have no application whatever to a case like the present. The cases cited by Mr. Leech are clearly distinguishable. In *Ashcroft* v. *Foulkes* (1) it will be found that at the time the action was commenced all that was due to the plaintiff was £17 10*s.* 2*d.* In *Beard* v. *Perry* (2) the amount due to the plaintiff was reduced by set-off to a sum under £20, and that was the state of affairs between the parties at the time the action was commenced. In *Savage* v. *Lipscome* (3) the marginal note is, "Where the writ is issued for a sum above £20, and before execution the plaintiff gives the defendant

(1) 18 C. B. 261. (2) 31 L. J. (N. S.) Q. B. 180. (3) 5 Dowl. 385.

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credit for a cross demand which has not been pleaded, and thereby reduces the debt to a sum under £20, the Master should tax the costs upon the reduced scale." If one looks at the facts of that case, it will be found that if the plaintiff had given a rightful credit of £9, the real amount due to the plaintiff when he went to law was a sum of less than £20, and therefore he was under the disability as to costs provided by the rules. *Donnelly* v. *Coyne* (1) was an action for the return of two receipts or their value, and for damages for their detention. After the writ was issued the receipts were handed over, with an offer to pay the costs up to that date, viz. the costs of the writ. *Qua* action for detinue the action was dead, and it was from that date an action for damages. £1 was paid into Court to meet the claim for damages, and the reason for the decision is given by Lord Justice Fitz Gibbon in the following words:—"It appears to me that the plaintiff is entitled to the costs of this action up to and including the return of the goods claimed, but that he is not entitled to any subsequent costs, because the action, thenceforward, was an action for damages only, and the amount recovered, £1, carries no costs, as the parties reside within the same civil bill jurisdiction."

Two cases were referred to by Mr. Horner on the other side. One of his cases is *Parr* v. *Lillicrap* (2), and I think it disposes of Mr. Leech's contention that "recover" means recover by judgment in the action. That is certainly not the construction put upon the word "recover" which occurs in the English statute, for Baron Pollock says:—"The case put by my brother Bramwell shows what is the meaning of the word 'recover' in the 13 & 14 Vict. c. 61, s. 11. It does not mean 'recover' by verdict or judgment, but 'obtain' by means of the suit." The other case referred to by Mr. Horner, *Fewster* v. *Boggett* (3), appears to me to carry him the whole way. The writ of summons was endorsed for £57 2*s.* 7*d.* The defendant as to all but £19 12*s.* 8*d.* pleaded payment before action, and as to that sum made a payment into Court. That apparently was all that was due from the defendant to the plaintiff, but at the trial it appeared that £13 of the amount

(1) [1901] 2 I. R. 7. (2) 1 H. & C. 615. (3) 9 M. & W. 20.

in respect of which payment was pleaded had been paid by the defendant after the writ had been issued, so that at the time the litigation commenced there was a sum of over £20 due. Accordingly, the £19 12*s.* 8*d.* paid into Court being all that was then due, the learned Judge at the trial entered judgment for the plaintiff for the £13, but only as a matter of form, the plaintiff undertaking to issue execution only for the costs. It was there held that the plaintiff was entitled to costs to be taxed on the scale applicable to the recovery of a sum over £20. Does it make any difference whatever that instead of being paid into Court the £5 was, as in this case, paid from hand to hand? *Palmer* v. *Garrett* (1), and *Hughes* v. *Guinness* (2) are entirely in point, and I hold that it is good sense and in accordance with the meaning of General Order LXV., Rule 4, that "recover" in the action means recover not necessarily by verdict or judgment or order made in the action, but recover by means of and by compulsion of the writ.

For these reasons I hold that the plaintiffs are entitled to all the costs of the action. The motion must be refused with costs.

Solicitor for the plaintiffs: *Robert Liddell.*
Solicitors for the defendants: *Andrews & Co.*

J. L.

(1) I. R. 5 C. L. 412. (2) 4 Ir. C. L. R. 314.

K. B. Div. 1901. Dec. 12, 13, 1902. Feb. 11.

THE KING (M'KAY) *v.* THE LOCAL GOVERNMENT BOARD FOR IRELAND (1).

Local Government (Ireland) Act, 1898, *sect.* 115—*Scheme for poor-rate collection—Existing officer—Poor-rate collector—Alteration of area and duties—Remuneration—Compensation—Mandamus.*

In section 115 of the Local Government (Ireland) Act, 1898, though sub-sections 11 to 15 form a special code regulating the position of county poor-rate collectors, these provisions are, nevertheless, subordinate to sub-section 18, which is applicable to the case of this class of officers, as well as to others.

The true construction of sub-section 11 is that it is a directory provision addressed primarily to the councils (but also controlling the Local Government Board), that, so far as possible, existing remuneration is to be preserved. Where, owing to change of area or otherwise, this is impossible, sub-section 18 makes it the duty of the Board to determine the appropriate alteration of remuneration.

The Board's approval of a rate-collection scheme (under sub-section 10) should be final and complete, and should be testified by a formal official act.

Mandamus may issue to the Local Government Board to take into consideration a collector's claim to increase of remuneration although their approval of the scheme under which his claim arises has not been finally and formally given.

MANDAMUS.

This was an application to make absolute, notwithstanding the cause shown, a conditional order, dated 26th October, 1901, for a writ of mandamus, directed to the Local Government Board for Ireland, commanding them, pursuant to the provisions of the Local Government (Ireland) Act, 1898, to take into consideration, and hear and entertain "the claim of John James M'Kay, an existing officer transferred to the Cavan county council, pursuant to the said Local Government Act, to increased remuneration by reason of increased duties, and to proceed to determine the increase of remuneration which" he should receive in proportion to the

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and MADDEN, JJ.

increase of his duties under the said Act, and forthwith to inform the said John James M'Kay of their decision: and further to do every act in the premises necessary to the due consideration of his claim, and to the due assessment of the increased remuneration aforesaid.

On the 5th of October, 1888, Mr. J. J. M'Kay had been appointed poor-rate collector for the electoral division of Cootehill, in the poor law union of Cootehill, Co. Cavan; he had been also deputy cess collector for the parishes of Drung and Laragh, in the barony of Tullygarvey, in the same county; and had continued to act as such poor-rate collector and deputy county cess collector down to and including 1st April, 1899, when he expressed his willingness to serve under the Cavan county council.

The new urban district of Cootehill had formed portion of the area in which he had collected poor-rate, but, on the passing of the Local Government Act, the Cootehill urban district council appointed a collector of their own, and the prosecutor ceased to collect in that area. As such collector, he had been paid 10*d.* in the £ on his collection of poor-rate, and 7*d.* in the £ on county cess, and he had been also in receipt of remuneration for work done as such collector in connexion with the revision of the Parliamentary and jurors' lists. In the scheme submitted to the Local Government Board the county council of Cavan proposed to pay all their collectors a uniform rate of sixpence in the £. The prosecutor refused to accept this, alleging that his duties were on the whole considerably increased, while at the proposed rate his remuneration would be less than that which he had theretofore received. Accordingly he sent in a a claim to the county council for increased remuneration, but, on 29th May, 1899, the county council resolved not to entertain it. On the 23rd July, 1901, M'Kay's solicitor wrote to the Secretary of the Local Government Board, asking whether the Board had approved of any scheme submitted by the Cavan county council under sect. 115, sub-section 10, of the Local Government Act, and received in reply a letter dated 26th July, 1901, forwarding a copy of the Board's letter (of the 21st July, 1899), to the county council, informally approving of the scheme, save so far as regarded the remuneration of M'Kay and another collector.

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On 1st August, 1901, M'Kay's solicitor forwarded to the Local Government Board a claim (under section 115, sub-section 18) for increased remuneration in proportion to increased duties, and on the 24th September, 1901, the Local Government Board wrote, refusing to entertain the claim on the ground that, having regard to the provisions contained in section 115, sub-section 11, of the Local Government (Ireland) Act, the Board were advised that the provisions of section 115, sub-section 18, of the Act were not applicable to the case of poor-rate collectors, and that therefore M'Kay's claim as collector for increased remuneration could not be entertained by the Board. The prosecutor (M'Kay) stated that pending the settlement of his claim he had accepted certain sums on account, but without prejudice to his claims, and that the details of his claim, as submitted to the Local Government Board, were true and correct, and that there was a substantial increase in the total amount of work now necessarily being done by him as collector by reason of the operation of the Local Government Act.

By way of cause against the conditional order an affidavit was filed by the Secretary for the Local Government Board for Ireland (Mr. H. M. Swaine), who stated that the Board had been advised (as set out in their letter of the 24th September, 1901), to the effect that, "having regard to the provision contained in section 115 (11) of the Local Government (Ireland) Act, the Board are advised that the provisions of section 115 (18) of the Act are not applicable to the case of poor-rate collectors," and accordingly submitted, on the Board's behalf, that the provisions of sub-section 18 of section 115 of the Local Government (Ireland) Act did not apply to the case of the applicant, and that the conditional order for mandamus should be discharged.

F. Fleming, K.C., and *T. H. Maxwell*, for the prosecutor.

S. Ronan, K.C., Matheson, K.C., and *J. Chambers*, for the Local Government Board.

Cur. adv. vult.

The judgment of the Court was delivered by—

GIBSON, J. :—

M'Kay was an existing officer in respect of two offices—a poor-rate collectorship for the electoral division of Cootehill, Co. Cavan, and a deputy cess collectorship for two parishes in the county—the former a pensionable office, the latter not. Part of the area included in his poor-rate collectorship was within the new urban district of Cootehill, and he has lost that portion of his collection. His poundage for poor-rate was 10*d.*, and for cess, 7*d.*, in the £, and he received also extra remuneration for Parliamentary electors' and jurors' lists.

Having expressed his willingness to serve, he was included in a scheme submitted by the county council, which fixed a uniform poundage rate of 6*d.* in the £ as collectors' remuneration. M'Kay declined to accept this, contending that his duties, so far from being diminished, were increased. Accordingly he sent in a claim to the council, and that body, on the 29th May, 1899, rejected it.

The Local Government Board gave an informal approval of the scheme, save so far as regarded the remuneration of M'Kay and another collector. Nothing further was done for two years, when M'Kay, who had acted meanwhile under protest, applied to the Board to settle his remuneration pursuant to section 115, sub-section 18. This the Board refused to do, on the ground that sub-section 18 did not apply to the case of a county collector. It was not suggested that the diminution of area could affect the applicant's *status* as existing officer. What the Board contend is that as existing officer he comes under sub-section 11, and is not within sub-section 18.

We have to determine two questions: 1, Is sub-section 18 applicable to county collectors? 2, Can M'Kay obtain mandamus before the Board approve of the scheme?

1. According to the Board, sub-sections 10 to 15 inclusive form a separate code regulating the position of county collectors. It is admitted that urban collectors are unaffected by this code but it is said that sub-sections 11 to 15 necessarily exclude transferred officers employed under a county scheme from the

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operation of sub-section 18. The sub-sections at first sight favour the Board's view, but further consideration suggests grave difficulties.

First, where a collector's duties are increased, by extension of area or otherwise, it hardly seems fair to the collector that he should be disentitled to increased remuneration when the urban collector under similar circumstances would get an increase. On the other hand, where duties are diminished by reduction of area or otherwise, it appears unjust to the council that they should be compelled to continue an excessive remuneration instead of paying compensation once for all, as in the case of an urban collector under sub-section 18. Where the area of collection is divided under the Act as here, the Local Government Board decide, under sub-section 20, to which authority the officer is to be transferred. Why should the rights of the transferred officer as to remuneration depend on the determination of the Board as to whether he is to be a county or an urban officer? Applicant's counsel suggest that an officer whose district is divided might be continued by both authorities, the county and the urban, and might be regarded as to both as a transferred officer. If this is legally possible (which I am very far from saying), as urban collector the officer's remuneration would be settled under sub-section 18, and might be increased or diminished. How, in case of diminution or increase, would his remuneration of substantially identical amount be ascertained in his other character of county officer, if sub-section 18 is inapplicable?

There is a second and more formidable difficulty. On the Board's construction all security of tenure disappears. Under section 83, sub-section 6, "save as otherwise provided by this Act, the county council may remove any of their officers." The Board say that under section 115, sub-section 15, a county collector employed under a scheme is deemed to hold office under a new appointment by the council, and not by way of transfer. If sub-section 18 does not apply he can be dismissed at pleasure. It follows that a scheme intended (as the Board argue) to protect collectors by making their remuneration irreducible can be easily and at once evaded by dismissing the collector and declining to reappoint him if he will not submit to diminished remuneration

No escape from this difficulty was suggested by counsel, and I can see none. Section 83, sub-section 14, gives no help, as, if sub-section 18 does not apply, no other provision has been cited which would protect M'Kay as an existing officer. Counsel declined to argue that sub-section 18 could be subject to dichotomy, the portion as to tenure being made applicable to a county collector, while the provisions as to variation of remuneration were excluded. This distributive construction appeared to me not impossible, but as it was not argued I do not dwell on it further.

It was urged that the injustice and absurdity I have pointed out are mitigated by sub-section 19, which enables a collector to get compensation on the footing of abolition of office if he is removed within five years from date of transfer from any cause other than misconduct or incapacity. Even if the sub-section applied, compensation for dismissal within five years is an inadequate substitute for the security of tenure conferred by sub-section 18. But sub-section 19 does not apply if the collector's status and rights depend on and are confined to the scheme. The provision in sub-section 19 relates only to a transfer under the Act of an officer who at that time could be removed without the concurrence of the Board or the Lord Lieutenant. M'Kay as poor-rate collector could not have been so removed If he became removeable without such concurrence by adhesion to a scheme, his voluntary action after the date of the statute would not bring him within the sub-section. Sub-section 19 depends on and is attached to sub-section 18. If one does not apply, neither does the other.

I now proceed to examine the section to see if the Court is compelled to adopt a conclusion attended with such unsatisfactory results.

The scheme is to be submitted within six weeks from the first meeting. As the first elections were to be held on the 6th April, 1899, the first meeting would be after that day. Reckoning even from the day of election, the six weeks would not expire till May 18th. There is no provision for the scheme being published or notified to the collectors. Willingness to serve was to be expressed on or before the 13th May. An officer might thus be obliged to express willingness to continue without knowing the

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contents of the scheme; and upon such expression of willingness his rights under sub-section 12 are made to depend.

In one respect the county collector is in a less advantageous position than the urban officer. The latter was transferred outright, while it is plain that an existing county collector had no indefeasable right to be included in a scheme. He might not be continued. His only protection was that he was not to be squeezed out by the introduction of new officials. If he was discontinued his only right was to compensation or a gratuity.

Sub-section 11 is primarily addressed to the council in relation to the preparation of the scheme, though it must also bind the Board when the scheme comes before it for approval. It relates to such of the existing officers as are to be continued. The scheme is to provide that such officers are to receive substantially identical remuneration as heretofore. Nothing is said about duties or any alteration of area. Whether the explanation of this is that the remuneration was to be irrespective of such matters, or that such considerations were to be dealt with under sub-section 18, is what we have to decide.

The three most probable constructions of sub-section 11 are as follows:—1. That put forward by the Board, namely, that the old remuneration was stereotyped, the protection of the officers as to duties or otherwise being entrusted to the control and discretion of the Board. 2. The sub-section is a directory provision addressed to the council (and of course also controlling the Board), that, *so far as possible*, existing remuneration is to be preserved. Where this is impossible, owing to change of area or otherwise, sub-section 18 must be brought into play. 3. The scheme must always, in the first instance, propose the existing remuneration, but the Board must, on the application of the council or officer, settle the proper remuneration in accordance with the provisions of sub-section 18. Of these constructions, the first is the most obvious, the second most convienient, and the third least probable.

The objection that on either of these two latter constructions, sub-section 11 is unnecessary and redundant, was answered by the suggestion that it was to be regarded as primarily an instruction to the council in framing the scheme. It regulates their duty, while sub-section 18 prescribes the duty of the Board.

If sub-section 11 had prefixed to it the words "subject to the provisions of sub-section 18," would there be any necessary inconsistency between the direction to preserve substantially identical remuneration, and the requirement that on increase or diminution of duties the Board were to determine the remuneration?

Before deciding the construction of sub-section 11, it is necessary to look at the other sub-sections. Sub-section 15 does not in terms state that the scheme is to be inoperative till approved, or that the Board may itself insert modifications and approve of such modified scheme. If their function is merely negative, that is, if they can only withhold approval until modifications proposed by them are accepted by the council, and the scheme amended by the council accordingly, a deadlock might ensue if the council were recalcitrant. The point was hardly noticed in argument. I shall assume (without pronouncing any final opinion) that the view submitted on behalf of the Board as to their powers is correct, and that, even if the scheme may be inoperative till approval—which is uncertain, see *Firth* v. *Staines* (1)—it may be amended by the Board, without the concurrence of the council, subject to the provisions of the Act.

This general power of modification is not inconsistent with sub-section 18 controlling the Board in making such modifications.

The part of sub-section 15 that was mainly pressed on behalf of the Board was the provision that all officers employed in pursuance of the scheme shall be deemed to be poor-rate collectors appointed by the council within the meaning of the Act. This means (it is said) that the officer holding under a scheme is no longer an existing officer by way of transfer, but is a new official. In reply, it is urged that the effect is no more than that of the provision in sub-section 1, directing that transferred officers are to become officers of the county or district council in like manner, subject to the provisions of the section, as if they had been appointed by that council. The repetition of the provision in sub-section 15 may be accounted for by the peculiar nature of a scheme and the special powers of the Board in modifying it.

Sub-sections 16 (as to alteration of area), and 20 and 21, seem

(1) 13 *Times* L. R. 394.

K. B. Div. 1902.

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Gibson, J.

to apply to county as well as to urban collectors. Why are such county collectors to be excluded from the intervening sub-sections 18 and 19?

Sub-section 18 starts with the words "subject to the provisions of this Act." The scope of this expression was not discussed or explained. The words are not (as in sub-section 1) "subject to the provisions of this sub-section." They may relate to particular existing officers who are specially provided for, as, *e.g.*, town clerks, under section 116. Whatever the words may mean, the paramount intention disclosed is to secure the tenure and remuneration of "every existing officer." The sub-sections are numbered consecutively, without break or division of any kind. If it had been intended to exclude all officers employed under a scheme, why does not the sub-section say, "every existing officer save those employed under a scheme"? It is difficult to construe "every existing officer" as not including county collectors under a scheme. This was the Chief Baron's opinion in *Campbell's Case* (1), and I agree with it.

Sub-sections 11 and 15 are subordinate to sub-section 18, which is paramount, and protects the tenure and remuneration of county collectors as well as all other existing officers. The scheme must, *so far as possible*, preserve the existing remuneration; but this benefit is not made illusory by the officers being deprived of the protection of sub-section 18. If part of the sub-section applies, it appears to be conceded that all must apply. If sub-section 18 protects from arbitrary dismissal, sub-section 11 does not necessarily exclude the application of the companion provisions as to alteration of remuneration.

2. If the scheme is still inchoate, by reason of there being as yet no final approval by the Board, is the applicant entitled to a mandamus? He has been working for two years as an existing officer employed under the scheme, which has been approved of, save as to his remuneration. M'Kay has legitimate ground of complaint as to the Board's delay is disposing of his case. I would repeat for the guidance of the Board the remarks I made in *Deane's Case* (2). The approval should not be piecemeal. It

(1) 35 Ir. L. T. R. 156. (2) [1901] 2 I. R. p. 380.

should be final and complete, and should be testified by a formal official act.

The Board have refused to apply sub-section 18 to M'Kay's case on a ground which is wrong in law, that sub-section 11 prevented them from doing so. Their refusal is based not on his not being an existing officer employed under the scheme, but on his remuneration under a scheme being necessarily incapable of increase. The mandamus ought, therefore, to be allowed to go. Whether the applicant (whose area has been diminished) will be better off by the application of sub-section 18 than if he had adopted the Board's view as to the stereotyping of the former remuneration, is a matter on which I decline to speculate. (1).

Solicitor for the applicant: *S. Jones.*
Solicitors for the Local Government Board: *T. T. Mecredy & Son.*

A. E. R. J.

IN RE LEEKS, A BANKRUPT (2).

Appeal. 1902. Jan. 17, 20,

Bankruptcy—Proof of debt—Landlord and tenant—Disclaimer by assignees of bankrupt—Apportionment of rent.

Upon the disclaimer by the assignees of a bankrupt of his interest in a lease, the lessor is entitled to prove in the bankruptcy for an apportioned part of the rent which has accrued due between the last gale day and the date of adjudication.

By lease dated the 5th June, 1883, James Rooney demised to William Chambers Jacob the house and premises No. 13, Suffolk-street, Dublin, for twenty-five years at the rent of £150 a-year, payable quarterly on every 1st January, 1st April, 1st July, and 1st October.

(1) On the application of counsel for the Local Government Board, it was directed that the writ should formally issue, so that the Board might have an opportunity of pleading in return thereto.

(2) Before FITZGIBBON, WALKER and HOLMES, L.JJ.

Appeal. 1902. *In re* LEEKS.

The lessee's interest was assigned to James Leeks on the 26th May, 1900. Leeks was adjudicated bankrupt on the 19th March, 1901. The rent was paid up to the 31st December, 1900. After the adjudication the assignees remained in possession for about four months for the purpose of realizing the bankrupt's stock, for which they paid the landlord £50 as an occupation rent for four months from the 19th March to the 19th July, 1901, being at the same rate as the rent reserved by the lease. This payment was sanctioned by an order of the Court of the 6th August, 1901. On the 13th August, 1901, the assignees obtained an order that they should be at liberty to disclaim the lease and give up possession to the landlord, and the landlord took up the premises. The landlord tenderd a proof of debt for £32 16*s.* 1*d.*, being the apportioned part of the rent from the 1st January to the 19th March, 1901—two months and nineteen days. The Chief Clerk admitted the proof. The assignees appealed to the Court, and on the 17th December, 1901, Boyd, J., disallowed the proof. From that order the landlord appealed.

Corvan, for the appellant :—

Since the Apportionment Act rent accrues due from day to day, so that the landlord can recover an apportioned part of a gale of rent in an action-at-law : *Swansea Bank* v. *Thomas* (1). An apportioned part of a gale is rent accrued due for which a landlord can distrain : *Re South Kensington Stores* (2) ; *Re Howell* (3). Rent is apportionable, after the tenancy has determined, under section 50 of Deasy's Act, and also under the Apportionment Act : *Elvidge* v. *Meldon* (4) ; *Re Wilson* (5).

The assignees are liable for rent accrued due subsequently to the adjudication : *Re Matthews* (6).

O'Brien, K.C., and *R. Doyle*, for the assignees :—

The apportioned part of the gale of rent would not constitute a good petitioning creditor's debt : *United Club and Hotel Co.* (7).

(1) 4 Ex Div. 94.
(2) 17 Ch. D. 161.
(3) [1895] 1 Q. B. 844.
(4) 24 L. R. Ir. 91.
(5) 62 L. J. Q. B. 628.
(6) 21 L. R. Ir. 507.
(7) 60 L. T. (N. S.) 665.

Appeal. 1902.

In re LEEKS.

A creditor cannot petition for adjudication or prove unless the debt is capable of being sued on. The debt must be both recoverable and payable at the date of the adjudication: *Gibson* v. *Courthope* (1); *Hopkins* v. *Thomas* (2); *Hoskins* v. *Duperoy* (3). Here the debt was not recoverable and payable, because the apportioned part can only become due after the entire gale of which it is a part has become due. The certificate releases the bankrupt from all debts provable in the bankruptcy, but if the debt be not provable the certificate is no defence: *Re Somerville* (4); *Re Lancaster Canal Company* (5).

Jan. 20.

FITZ GIBBON, L.J.:—

We do not require a reply: though the question requires careful examination, the result of the legislation is clear. We were told—and it was the argument most pressed—that there is no precedent for allowing accruing rent to be proved as a debt. The fact—even if established—that a number of other people had not asserted a right could not deprive any person of it. But in the present case the facts do not support the argument. The Officer of the Court, who has long experience, and who must have known the practice, if it was established, has allowed the proof, and has stated that this was the first occasion upon which attention was called to the matter. Before accepting the statement that the claim had been foregone so often as to raise a presumption that it was unfounded, we should be satisfied that the previous cases were in the same position as the present, and were considered and numerous. The number of really similar cases must have been small. The question could not arise in any case of surrender by agreement, nor unless the assignees disclaimed, and tenants interests are very rarely valueless.

A landlord, whose right to rent is determined by a tenant's bankruptcy, must be entitled to prove for the apportioned rent up to the bankruptcy, unless the result of the legislation has made this particular class of debt an exception, and has left it in a sort

(1) 1 Dow. & Ry. 205.
(2) 7 C. B. (N. S.) 711.
(3) 9 East, 498.
(4) 1 L. R. Ir. 293.
(5) Mont. Rep. 27.

Appeal. 1902.

In re LEEKS.

Fitz Gibbon, L.J.

of Limbo, due and payable yet not recoverable, not ranking for dividend in a present bankruptcy yet barred in a future one.

At common law a liability to pay money periodically created no recoverable debt unless and until a full periodical payment accrued. But at all times by agreement, and in a constantly increasing number of cases by statute, apportionment was recognised, and the common form of giving it was by declaring that the debt "accrued from day to day." The words of the English Bankruptcy Act, 1869, s. 35, demonstrate that every debt which has "accrued from day to day" is provable in bankruptcy; because the right to prove for apportioned rent up to the date of adjudication is given by enacting that it shall be treated "as if such rent grew due from day to day."

The Irish Act of 1872 was drawn with great care, by a lawyer with special knowledge of bankruptcy law and practice, and it was drawn on the lines of the English Act. It contains no section corresponding with the Act of 1869, s. 35; but s. 97 deals *inter alia* with land of any tenure burdened with onerous covenants, and it provides that such property may be disclaimed, and that upon disclaimer the property shall, if the same is a lease, "be deemed to have been surrendered from the date of the adjudication."

Deasy's Act, sect. 50, tells us the effect on the landlord's right to rent of the "surrender at the date of the adjudication," which is "deemed to have been" made. It also explains the omission from the Irish Act of 1872 of any section corresponding to s. 35 of the English Act of 1869. It was left out because the Apportionment Act, 1870, which had passed in the meantime, had rendered it unnecessary. But Deasy's Act had the same effect. Sect. 49 provides for apportionment of rent where a lease continues. Where a tenancy determines otherwise than by the act of the landlord, which includes disclaimer on bankruptcy, sect. 50 provides for the payment to the landlord of apportioned rent from the last gale day to the date of determination. The amount payable is a debt recoverable, and therefore provable. If recoverable on a surrender by agreement, it is *a fortiori* recoverable on a surrender *in invitum* as regards the landlord by assignees in bankruptcy.

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But the Apportionment Act is equally conclusive. It is simply an extension of the Bankruptcy Act, 1869, sect. 35. The only difference is the addition of the *simile*, "like interest on money lent." Interest on money lent—on bills, notes, and all other interest-bearing debts—is admittedly apportionable and provable in bankruptcy up to the date of adjudication, and it is so because it "accrues from day to day." Rent must follow the same rule, both under Deasy's Act and under the Apportionment Act. The provision in Deasy's Act that apportioned rent becomes payable "in the case of a rent . . . determined by re-entry, death, or otherwise," which includes disclaimer on bankruptcy, "when the next entire portion of the same would have been payable, if the same had not so determined, and not before," explains why such apportioned part of rent can never be a good petitioning creditor's debt, and gets rid of the argument that *therefore* it is not a provable debt. It *becomes* a debt on the determination of the lease by the disclaimer, which relates back to the bankruptcy; but it is not a debt payable at the date of the petition.

It has been contended that the provisions in the Schedule to the Act of 1883, and in the Winding-up Act, show that the Apportionment Act was not regarded in England as having made apportioned rent provable as a debt. These provisions may be surplusage, or they may have been introduced to make the code in which they occur complete in itself. But at best the argument only amounts to saying that they are repetitions of the Apportionment Act. But our Irish legislation needs no such explanation. We must discharge the order of Boyd, J., restore the ruling of the Registrar, and admit the landlord's proof for £32 16*s.* 1*d.*, with all costs above the ordinary costs of making an undisputed proof, which by bankruptcy practice the creditor must bear.

WALKER, L. J.:—

I concur. I assume, and I am ready to admit, that an apportioned part of a gale of rent will not sustain a debtor's summons under the Bankruptcy Act. The case of *The United Club and Hotel Company* (1) is an authority for that. In the old

(1) 60 L. T. (N. S.) 665.

Appeal. 1902. *In re* LEEKS. Walker, L.J.

bankruptcy law a creditor could only prove a debt which is not only due but payable. But in this case once the order of the 13th August, 1901, was made, the lease is to be treated under the 97th section of the Act of 1872 as if it had been surrendered on the 19th March, the date of the adjudication, and then under sect. 50 of Deasy's Act the landlord is entitled to recover an apportioned part of the rent. The language of the section of the Act of 1860 is that the rent shall be apportioned. Again, under the Apportionment Act of 1870, the rent is to be considered as accruing from day to day.

The Kensington Store Case (1) decided that the Apportionment Act applied in the case of a winding-up. In that case rent was payable quarterly under the lease. The rent had been paid down to the 24th June, and the winding-up petition was presented on the 27th November, and it was held that the landlord was entitled to prove for rent down to the date of the presentation of the petition as rent which had accrued due.

I am not at all sure that there is not another answer to the assignees to be found in sect. 258 of the Act of 1857; but I do not think it necessary to go into that, because the two grounds I have mentioned are sufficient for the decision of the case.

HOLMES, L. J.:

I concur, and I am ready to decide the case on either ground.

Solicitors for the appellant: *Horan & Shortt.*
Solicitor for the assignees: *W. T. Daniel.*

R. D. M.

(1) 17 Ch. D. 161.

FINN *v.* CLIFFORD (1).

(1901. No. 6982.)

K. B. Div.
1901.
Nov. 14, 25.

Practice—Costs—Civil bill jurisdiction—Residence—County—Division—General Order LXV., Rule 4.

The words in General Order LXV., Rule 4: "When the parties reside within the jurisdiction of the Civil Bill Court of the county in which the cause of action has arisen" have reference to the general jurisdiction of the Civil Bill Court in relation to the whole county and not to a division of the county. When the parties reside in different divisions of the same county or County Court Judge's jurisdiction in which the cause of action has arisen, the plaintiff must recover a sum not less than £20 to become entitled to costs in the action.

MOTION by the defendant to set aside a judgment entered up against him in the action on the ground that it was entered up irregularly and for an excessive sum. The judgment was marked in default of appearance for £12 5*s.* 6*d.* debt, the claim indorsed on the writ, and £2 9*s.* costs. The plaintiff resided at Ballinknockan, in the Tralee division, and the defendant at Beaufort, in the Killarney division of the county of Kerry, where the cause of action arose. Upon the marking of the judgment the plaintiff's solicitor gave a certificate in the ordinary form, that the parties did not reside within the same civil bill jurisdiction. His attention was called to the fact that the parties resided within the same county though in different divisions, but he expressed himself willing to take the risk of entering up the judgment with costs. Thereupon judgment was entered up for the plaintiff with half costs.

D. Kehoe, for the defendant:—

General Order LXV., Rule 4, applies when the parties reside in any part of the county in which the cause of action arose.

(1) Before KENNY, BARTON, and WRIGHT, JJ.

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FINN v. CLIFFORD.

M'Cutcheon, for the plaintiff :—

Civil bill jurisdiction means the division of the county. The parties are not within the same division of the county, and half-costs should be allowed. [He referred to the Civil Bill Act, 1857 (14 & 15 Vict. c. 57), section 69, and to the Common Law Procedure Act, 1870, sections 5 and 6.]

Cur. adv. vult.

Nov. 25.

KENNY, J. :—

This is an application on behalf of the defendant that the judgment entered up in this action may be set aside, on the ground that it was marked irregularly and for an excessive sum. The judgment was marked for a liquidated sum of £14, and no irregularity is alleged except the inclusion of a sum for costs. The point is this—Both plaintiff and defendant reside in the county of Kerry, but in different civil bill divisions of that county. The question is whether or not under these circumstances the plaintiff, entering up judgment by default for the sum of £14, being less than the sum of £20 referred to in Order LXV., Rule 4, is entitled to judgment with costs. It is an extraordinary thing that no case can be referred to in which that point has ever been decided. It could have arisen so far back as the Common Law Procedure Act of 1856, the 97th section of which is identical with the last-mentioned rule so far as the present question is concerned. In the case before us what took place was this. In these cases where judgment by default is sought to be entered up in an action of contract for a sum under £20 the Master most properly requires that the solicitor for the plaintiff shall give him a certificate that the parties do not reside within the same civil bill jurisdiction. It is obvious that a certificate in that form leaves open for argument the question whether, where the parties, though residing in the same county, do not reside within the same division, the contention of the defendant is a right one, that there should be no costs. Before forming an opinion that might be in disagreement with that of so learned, and so painstaking an official as Master Pigot (who was the Master in this case) we thought it right to hear from him what

took place in the office. He told us that the certificate was given by the plaintiff's solicitor in the general form I have mentioned. The attention of the plaintiff's solicitor was then called to the fact that the parties resided within the same county though in different divisions, whereupon the plaintiff's solicitor (or whoever attended for him) professed himself ready to take any risk that might attend the entering up of the judgment *with costs*. Accordingly it was given to him with half costs. We further asked Master Pigot whether it was an established practice in the office to allow costs in such cases as the present, and he informed us that it was, and that in his opinion the true construction of the rule warranted it. We regret that we are obliged to put a different interpretation on the rule. Our attention has been called to the sections of the Remitting Act. We do not think that they affect our judgment in the case. These sections are peculiar *inter se*, in this, that the language of the 5th section as to the jurisdiction to which the action is to be remitted is, as has been pointed out by Lord Justice Fitz Gibbon in *Garland* v. *Blackstock* (1), widely different from the language of section 6. In cases under section 6 the action is to be remitted to the *division* of the county in which the defendant resides, while in section 5 there is no reference to the division.

It is also said that the 69th section of the Civil Bill Act (14 & 15 Vict. c. 57) has an important bearing on the question. That section provides that "No defendant shall be liable to be sued or proceeded against by civil bill under this Act, or obliged to appear in any cause to be heard and determined at any sessions or adjournment thereof to be held out of the division in which he usually resides unless there shall be more than one defendant, &c." That is a section which, it seems to me, was enacted more for the purpose of convenience and the proper distribution of civil bill business than for any other reason. It gives us no help in construing the General Order we are dealing with, because although the defendant could only have been sued by civil bill in the particular division in which he resided, the jurisdiction of the County Court Judge extends to every division of the county.

(1) 20 L. R. Ir. 194.

K. B. Div. 1901.

FINN v. CLIFFORD.

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In our opinion the words "when the parties reside within the jurisdiction of the Civil Bill Court of the county in which the cause of action has arisen" have reference to the general jurisdiction of the Civil Bill Court in relation to the whole county, and not to any particular division of it—with the result that the General Order applies whenever the parties reside in the same county though in a different division of it.

With reference to the certificate, I think the Masters will have to modify its form, so that it may read as follows:—"I certify that the cause of action arose within the county of , and that the plaintiff and defendant do not both reside in that county."

BARTON and WRIGHT, JJ., concurred.

Solicitor for the plaintiff: *James Egan.*
Solicitors for the defendant: *T. F. O'Connell & Son.*

J. L.

THE QUEEN (WEXFORD COUNTY COUNCIL) *v.* THE LOCAL GOVERNMENT BOARD FOR IRELAND (WEBSTER'S CASE) (1).

Appeal.
1901.
Jan. 26, 29, 30, 31.
Feb. 25.

SAME *v.* SAME (LEARY'S CASE) (1).

*Local Government—Existing officer—Increase of remuneration—Increase of duties—County surveyor—Assistant surveyor—Sealed order of Local Government Board—*Certiorari*—Judicial act—Jurisdiction of Local Government Board—Local Government (Ireland) Act*, 1898, *sect.* 115, *sub-sect.* 18.

Section 115, sub-section 18, of the Local Government (Ireland) Act, 1898, enacts that if any existing officer transferred to the County Council has his duties increased or diminished by reason of the Act, he shall be bound to perform those duties, and shall receive such increase or diminution of remuneration in proportion to the increase or diminution of his duties as the Local Government Board may determine. It appeared from the statements of the Local Government Board that in the case of two existing officers—a county surveyor and an assistant surveyor—the Board, in purporting to determine what their increase of remuneration was to be under this section, recast their old salaries, giving not merely increase of remuneration in respect of the increased duties, but fixing a scale of remuneration for all the officers' duties, old as well as new:—

Held, that the determination of the Local Government Board was so far a judicial act, that it was not exempt from *certiorari*, and that, as their decision was based on a wrong principle, a writ of *certiorari* should issue for the purpose of quashing it.

APPEALS from two orders of the Queen's Bench Division made 1st December, 1900, allowing the cause shown against conditional orders for writs of *certiorari* obtained on 15th August, 1900, by the County Council of Wexford for the purpose of quashing, respectively, an order of the Local Government Board of Ireland of 26th June, 1900, whereby they ordered and determined that Henry Webster, the county surveyor of the county Wexford, should as from the 1st April, 1899, receive an increase of remuneration

(1) Before PALLES, C.B., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

Appeal. 1901. REG. (WEXFORD CO. COUNCIL) v. LOCAL GOVT. BOARD.

amounting to £200 per annum, and an order of the Local Government Board of 5th July, 1900, whereby they ordered and determined that Patrick Leary, assistant surveyor in the county of Wexford, should as from 1st April, 1899, receive an increase of remuneration amounting to £70 per annum.

Webster was appointed county surveyor of the county Wexford in 1892 at a salary of £500 per annum, together with £50 per annum for an office and clerk, which salary was increased in 1894 to £600 per annum, with a similar allowance for an office and clerk. On the coming into operation of the Local Government (Ireland) Act, 1898, he was an "existing officer" "transferred to the Council of the county" of Wexford within the meaning of section 115 of that Act.

On 29th August, 1899, the Local Government Board sent a circular letter to the secretary of each County Council in Ireland in the following terms:—

SIR,—The Local Government Board for Ireland desire to draw the attention of the County Council to the terms of section 115, sub-section 18, of the Local Government (Ireland) Act, 1898, which provide that existing officers transferred under the section shall receive such increase or diminution of remuneration in proportion to the increase or diminution of their duties as the Local Government Board may determine, and that the County Council, with the approval of the Board, may make a special agreement with any of their officers in the matter.

To enable them to discharge the duties thus imposed upon them, the Board will be glad to receive within three months from the present date a statement showing the salaries of the secretary, county surveyors, assistant surveyors, and other officers of the Council who are affected by the provisions of the sub-section referred to and who have not made a special agreement with the Council on the subject, together with a statement as to the increase or diminution of work to be taken into account in each case.

Any observations which the Council may see fit to make respecting the claims of their officers under the enactment in question will receive full consideration on the part of the Board.

I am, &c.

In accordance with the request contained in this letter, and in response to an application by Webster for an increase of salary, the Finance Committee of the County Council of the County Wexford passed a resolution on 22nd November, 1899, confirming Webster's

salary of £600 and the allowance aforesaid, and this resolution having been duly confirmed at a meeting of the Council on 11th December, 1899, was forwarded to the Local Government Board. The resolution of the Finance Committee was in the words following:—"We recommend that Mr. Webster's salary, £600 a-year, be continued, and that he be allowed £50 a-year for a clerk and office. We also recommend that the salaries of the deputy surveyors remain as they are." Webster was in attendance at the meeting of the Finance Committee, and submitted for their consideration, and they considered, a list made out by him of additional and new duties imposed upon him under the Local Government Act.

Webster had also been in correspondence with the Local Government Board, and had sent them a copy of the list of his additional and new duties which he had submitted to the Finance Committee. The Local Government Board on 23rd November, 1899, sent him a form which they required him to fill up giving particulars as to his former salary and emoluments, his proposed future salary and emoluments, stating whether he agreed to accept the salary proposed, and, if not, what amount he claimed, and also asking for a brief statement of his additional duties. Having received this form, Webster waited until the resolution of the County Council confirming the Finance Committee's resolution was passed, and then having filled in the particulars required on 12th December, 1899, sent the form to the Local Government Board, stating that he declined to concur in the Council's decision, and would appeal to the Local Government Board to settle the question. In his letter he also furnished the Board with information and particulars which he considered of importance in relation to his claim for increased remuneration, detailing the number of miles of roads under his charge, the number of bridges, piers, and harbours, and the trouble caused by the large seaboard of the county, and the charge of roads running down to strands which were often injured by storms, &c.

The general body of county surveyors over Ireland had also sent in to the Board a memorandum setting out the increase of duties devolving upon them as a body under the Local Government Act.

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No further communication took place between the Board and the County Council, nor between the Board and the Finance Committee relative to Webster's salary, until the 7th February, 1900, when the Board sent the County Council the following letter:—

SIR,—I am directed by the Local Government Board for Ireland to inform you that they have had under consideration the claims for increased remuneration for increased duties made to them under section 115 (18) of the Local Government (Ireland) Act, 1898, by the county surveyors who have failed to come to an agreement with the County Councils on the matter.

The Board have carefully considered all representations which have been received by them from the County Councils and their officers in response to their circular of the 29th of August upon this subject, and they have also had before them a memorandum prepared by the county surveyors showing the nature of the increased duties devolving upon them under the Act.

The Board observe that the surveyors contend that their travelling expenses are largely increased, owing to their having to attend the meetings and adjourned meetings of the County and District Councils, and to make quarterly inspections for contractors' payments.

They also represent that their additional work in connection with their new duties, including the preparation of plans and specifications and quarterly reports for the District Councils, will practically occupy their entire time, so that their private practice must necessarily fall off, and will no longer be the same source of income to them which it has been in the past.

The Board, in considering the claims of the surveyors, have come to the conclusion that a fixed addition of salary, uniform in each class, should be given to cover the additional office work and other new duties which will be common to all county surveyors, and that the mileage of roads in each county should be a factor in determining the amount of the increased salary which the surveyors would be entitled to in order to recoup them for the additional travelling expenses.

The salaries of all surveyors have accordingly been fixed upon this principle, which has been subject to a very slight variation to meet exceptional circumstances in the case of a few counties.

The salary to be paid to the county surveyor of Wexford, including the additional remuneration for his increased duties, is accordingly fixed at £800 per annum, the increase to date from 1st April last.

I am, &c.

This letter having been submitted to the Finance Committee on 23rd February 1900, that body passed a resolution disapproving

of the increase of salary proposed by the Local Government Board to be granted to Webster, and appointed a committee to draw up a resolution stating the reasons for this decision to be forwarded to the Board. The committee so appointed was directed to examine the list of increased duties furnished by Webster when the matter was under the consideration of the Finance Committee. In accordance with this resolution the committee appointed for the purpose therein mentioned met on 3rd March, 1900, considered item by item the list of increased duties furnished by Webster, and adopted a resolution disapproving of the increase of his salary and stating their reasons for such disapproval at considerable length. This resolution was at once forwarded to the Local Government Board. It also came before the County Council at their next meeting, 3rd April, 1900, and was approved of, and a supplementary list of reasons in support thereof was adopted by the Council. The resolution so approved and adopted, and all the said reasons were forwarded to the Local Government Board, who replied thereto by letter of 30th April, 1900, which was as follows :—

SIR,—The Local Government Board for Ireland have had before them the resolutions of the Wexford County Council of the 23rd ultimo and 3rd instant on the subject of the salaries fixed by the Board for the county surveyor and the assistant surveyors in the county, and in reply the Board desire to state that if the arguments put forward by the Council in support of their protest against the increased salary of the county surveyor and his assistants had been furnished to the Local Government Board last autumn, when they invited the views of the Council upon the claims of these officers, the Board would have weighed very carefully the Council's opinions before they decided upon the increased salaries to be allowed in these cases.

The Council, however, did not intervene in the matter either by supplying the Local Government Board with any statement of their views, or by coming to an agreement with these officers, and the Board under these circumstances had only to fulfil the obligations imposed upon them by section 115 of the Act.

With regard to the Council's resolution, the Board have only to remark that while the Council admit that these officers have certain increased duties to perform, they nevertheless propose to allow them no increase of salary whatever.

The Local Government Board desire to remind the Council that these salaries are only payable to existing officers, and that the amount of the total

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additional allowances payable to existing officers, whose salaries have been increased by the Local Government Board, does not represent a charge to the ratepayers of even one farthing in the pound.

I am, &c.

On the receipt of this letter, 1st May, 1900, the County Council at their meeting on that date passed the two following resolutions :—

1. "That our secretary be instructed to write to the Local Government Board stating that the County Council had not time properly to consider the question when it first arose—that in view of the large principle at stake and of the very cogent reasons for agreeing to the request of the Council and to which the Local Government Board have made no reply, we press the Local Government Board strongly to reconsider the attitude they have taken up in this case, and see if something could not be done to meet the views of the County Council."

2. "That we concur with the resolution of the Irish County Councils General Council as follows:—Resolved—That this Council, which represents the majority of the County Councils of Ireland, protests against the arbitrary conduct of the Local Government Board in increasing the salaries of county and other officials under the Local Government Act without furnishing the Councils concerned with the evidence, or giving the reasons on which it based its decisions."

The Local Government Board replied by letter of the 26th May, 1900 :—

SIR,—The Local Government Board for Ireland have had before them the resolution adopted by the County Council of Wexford at their meeting on the 1st instant, requesting the Board to reconsider their action in connection with the salaries of the county officials, and with reference thereto I am to state that the Board regret that they are unable to alter their decision as conveyed in their letter of the 30th ultimo on the subject.

The Board desire to point out that an opportunity was given to the County Council of Wexford, as well as to every other County Council in Ireland, of stating their view with regard to the salaries of their officers.

The County Council of Wexford came to no agreement with their officers in the matter, and the Local Government Board had therefore no course open to them but to fix the salaries as they were required to do by section 115 (18) of the Local Government (Ireland) Act, 1898.

I am, &c.

And on 27th June, 1900, the Local Government Board again wrote to the County Council :—

SIR,—I am directed by the Local Government Board for Ireland to inform the County Council of Wexford that the Board have received a communication from Mr. H. Webster, county surveyor, in which he states that the County Council have declined to pay him the salary due to him according to the scale determined by the Board on the 24th January, 1900, under sec. 115 (18) of the Local Government (Ir.) Act, 1898, which was duly notified to the Council on the 7th February last.

Mr. Webster states that he is about to institute legal proceedings against the Council, and the Board have therefore issued a special order under seal to enable him to recover the amount of salary which the Board have determined in his case.

A copy of the sealed order is enclosed, and the Board trust that the Council will not involve themselves in legal costs in opposing the rights to which their officers are entitled under Act of Parliament. The Board have suggested to Mr. Webster to defer further proceedings pending the next meeting of the Council.

I am, sir, &c.

The sealed order referred to in this letter was as follows :—

We, the Local Government Board for Ireland, in exercise of the powers vested in us by sub-section 18 of section 115 of the Local Government (Ireland) Act, 1898, do hereby order and determine that Henry Webster, county surveyor in the county of Wexford, being an existing officer, transferred by the said Act to the Council of the said county, is entitled, under the above-cited sub-section of the said Act, to receive as from the first day of April, 1889, an increase of remuneration amounting to £200 per annum.

Sealed with our seal this 26th day of June, in the year of our Lord, 1900.

(Signed),

H. A. ROBINSON.
R. BAGWELL.

On 15th August, 1900, the Wexford County Council obtained a conditional order for a *certiorari* to bring up and quash this sealed order. This conditional order was obtained on an affidavit of Mr. Pigott, the secretary of the Council, setting out the matters aforesaid, and alleging that the decision arrived at as to Webster's salary was arrived at practically on an *ex parte* statement contrary

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to natural justice and to the method prescribed by law and in total disregard of the special circumstances of the county Wexford. The affidavit also contended that it appeared from the letter of 7th February that the Board decided that a fixed addition of salary, uniform in each class, should be given to cover additional office work and other new duties which will be common to all the county surveyors, and that the mileage of roads in each county should be a factor in determining the amount of the increased salary in order to recoup them for the additional travelling expenses.

Sir Henry Robinson, the Vice-President of the Local Government Board, swore an affidavit for the purpose of showing cause against the conditional order. The material portions of this affidavit are as follows:—

5. Inasmuch as the County Council and the said county surveyor, Henry Webster, had failed to come to an agreement as to the future salary to be paid to the latter, the Board were bound to carry out their duty in reference to the matter as prescribed by the Local Government Act, and as similar questions had arisen in other counties in Ireland, the Board had to consider and did consider the general effect of the said Act on the duties of existing officers generally, and of each class of such officers throughout the country, for the purpose of enabling the Board to discharge their said duty in reference to county surveyors. The Board made most elaborate inquiries all over Ireland as regards the duties of county surveyors under the Grand Jury system, and under the new Act, and such inquiries were conducted altogether independently of any statement made or communicated to the Board either by such officers themselves or by any association or body purporting to represent them. In such inquiries the Board had the assistance of well-qualified Government officials who were perfectly familiar with the duties of county surveyors, as well as the benefit of communications on the matter from many other County Councils in Ireland, and, besides, the members of the Board, by virtue of their position and duties both prior to and since the passing of the Local Government Act, had ample knowledge of the work devolving upon county surveyors. As a result of these inquiries the Board came to the conclusion that the duties devolving upon county surveyors generally under the Act were considerably increased, and that increase of salary should, in the absence of agreements between the County Councils and the county surveyors, be determined upon by the Board, and for the purpose of so determining the Board honestly and *bona fide* considered with extreme care the nature of the duties to be performed by the county surveyors under the new Act as compared with their duties under the Grand Jury system.

6. The Board had also before them a memorandum prepared by the general body of county surveyors, setting forth the alleged increases of duties devolving upon them as a body under the new Act, their duties being in the main similar in each county; but in no case was any statement made, either by the general body of county surveyors, or by an individual member, accepted or acted upon by the Board without separate and independent investigation, and was only accepted and acted upon to the extent to which it was verified by such investigation. I beg leave to refer to a copy of the said memorandum from the county surveyors on which, marked "C," I have endorsed my name before swearing this affidavit.

7. After the receipt by the Board of the notice from said Henry Webster, referred to in the 4th paragraph hereof, that he declined to accept the salary proposed by said County Council, the Board specially considered his claims as county surveyor of the said county of Wexford, and having decided that the general principles adopted by them, after such investigation and inquiry as aforesaid, were applicable to said county, and that the duties which the said county surveyor was bound to perform were increased by reason of said Local Government Act, determined that the salary of said county surveyor should be increased by the sum of £200 per annum, such increase being in proportion to the increase of his said duties as determined by the Board. The Board had the most ample materials to enable them to arrive at their determination, and had intimate knowledge of said county surveyor's duties both before and after the passing of the Local Government Act.

8. The said County Council were, as I verily believe, well aware that the said county surveyor had declined to accept the salary proposed by them, and that he had called upon the Board to determine the matter immediately after the said 12th day of December, yet the said County Council took no steps whatever to inform the Board of their views, nor did they submit to the Board any criticism whatever on the claims of the said Henry Webster in respect of alleged increase of duties, as placed before the said County Council by the said Henry Webster; and the Board had no information whatever from the said County Council on the subject other than that conveyed by their said resolution until after the date of their said letter of 7th February, 1900.

9. By said letter of the 7th February, 1900, the Board intimated to said County Council their determination as regards the salary which should be paid to said county surveyor, but it is utterly erroneous to state that said determination was arrived at on *ex parte* evidence, or without taking the trouble to inquire whether the said *ex parte* allegations were well grounded or not, or that said circular of the 7th February is based on such *ex parte* allegations; on the contrary, I repeat that said determination was based entirely on the separate and independent investigation of the Board, and no statement from any quarter was accepted or acted upon unless found to be accurate after full investigation. The Board fully recognize that county surveyors would naturally be inclined to exaggerate their claims, and took the utmost pains to arrive at a just conclusion as between them and the County Councils.

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10. It is also erroneous to state that the Board have fixed uniform salaries for all county surveyors, or that it was so stated, or intended to be so stated, in said circular of the 7th February. As before mentioned, the Board came to the conclusion that certain increased duties by reason of the Act, were, and would be, common to all county surveyors, and that in respect of such common duties a uniform increase of remuneration in each of the four classes of counties respectively should be allowed. The Board also consider that the total road mileage in each county should be considered as a factor in determining the amount of increased salary to be paid to county surveyors, and this factor, amongst others, was in each case fully considered by the Board as a matter of duty by reason of the system of quarterly instead of half-yearly payments to contractors. Under the new Act county surveyors should inspect all contract roads within the county four times each year instead of twice, as formerly, and this duty county surveyors are expressly bound to perform under the Act: besides, the Local Government Act imposes on the Councils the statutory duty of keeping all public works, including roads of every kind, bridges, pipes, arches, fences, &c., in good condition and repair, thereby involving on the part of the county surveyor largely increased duties as compared with his duties under the Grand Jury.

11. It is also utterly erroneous to state that the special circumstances of the county of Wexford were not considered by the Board in arriving at the determination of the increase of salary aforesaid. They were all fully considered, and the Board had complete knowledge of them. The county of Wexford requires extreme skill and attention on the part of the county surveyor. It has a large sea-board, with piers and harbours under the surveyor's charge, and several roads running down to strands and landing-places. These roads are often injured by storms, and they accordingly require regular attention and inspection. There are also a number of very important bridges, including, as I believe, six with opening spans over the rivers Slaney and Barrow.

12. I beg leave to refer to the resolutions of the Finance Committee of the 23rd February, 1900, and also to the other minutes and resolutions referred to in the 5th paragraph of Mr. Pigott's affidavit, and in reference thereto I respectfully submit to this Honourable Court that it is manifest therefrom that the said County Council have acted and are acting throughout on the assumption that the said county surveyor's former salary was and is ample, and that their decision hereinbefore referred to was arrived at wholly irrespective of any increase or diminution of duties by reason of the Local Government Act. In support of this I beg leave to refer to a resolution of the said County Council at a meeting held on the 23rd February, 1900, in which they set forth that "If the appointment of county surveyor was open they would be able to obtain the services of a competent official at a salary less than the Council have been paying Mr. Webster," on a copy of the said resolution and the Board's reply thereto, marked repectively "D and E," I have endorsed my name before swearing this affidavit.

13. In further reference to the before-mentioned reasons and resolutions of said County Council, I beg leave to say that the matters therein referred to were in fact considered by the Board before they arrived at their said determination, and for the purposes thereof, and the Board did come to the conclusion thereon that some of the items of claim put forward by Mr. Webster were not such as to entitle him to increased remuneration in respect thereof, and they were accordingly disregarded by the Board. In no case were his statements as to increased duties accepted without investigation. The Board still remains of opinion, after consideration of all the statements and resolutions placed before them by the County Council, that the increase of salary determined upon by them as payable to said county surveyor is just and equitable, having regard to the increase of duties which he is bound to perform by reason of the Local Government (Ireland) Act.

14. I also beg leave to refer to the several documents mentioned in the 6th and 7th paragraphs of Mr. Pigott's affidavit when produced.

15. The Board hoped that said County Council would eventually adopt the increase of salary mentioned in said letter of the 7th February, but as the Council persisted in their refusal to pay Mr. Webster in accordance therewith, the Board issued the said sealed order of 26th June, 1900, duly executed in accordance with the provisions of the statute.

16. I respectfully submit to this Honourable Court that the said order was legally and properly made by the Board, and was within the jurisdiction and the powers of the Board under the law in that behalf.

There was also filed an affidavit by Webster and an affidavit in reply by the Secretary of the Council, but their contents are not material for the purpose of this report.

Leary was an assistant surveyor in the county of Wexford at the date of the passing of the Local Government (Ireland) Act, 1898, at a salary of £80 per annum. He also was an "existing officer" "transferred" to the County Council within the meaning of section 115 of the Act. The facts of his case and the correspondence relating thereto may for the purpose of this report be taken as identical with those of *Webster's Case*, except that the Local Government Board notified the increase of his salary to the County Council by a letter of 23rd February, 1900, and that the sealed order in his case was dated 5th July, 1900, and a copy of it was enclosed by the Board to the Council in a letter dated 6th July, 1900. The letter of the 23rd February was as follows:—

SIR,—I am directed by the Local Government Board for Ireland to state that they have had under consideration the claims for increased remuneration

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for increased duties made to them under section 115 (18) of the Local Government (Ireland) Act, 1898, by the assistant surveyors who have failed to come to an agreement with the County Councils on the matter.

The Board have carefully considered all representations which have been received by them from the County Councils and their officers in response to their circular of the 29th August upon this subject, and they have also had before them a memorandum prepared by the assistant surveyors, showing the nature of the increased duties devolving upon them under the Act.

It appears that the length of roads in assistant surveyors' districts varies, except in a very few cases, from 200 to 500 miles, and, in considering the claims of these officers, the Local Government Board have come to the conclusion that the mileage in each assistant's district should be taken into consideration in determining the salary of these officers, but that no salary should be less than £120 a year.

The Board have accordingly decided that the salaries of all existing assistant surveyors should be increased, and should be fixed according to the following scale in all cases where an agreement had not been arrived at:—

Districts not exceeding		250	miles,	£120	a year
,,	,,	270	,,	£125	,,
,,	,,	300	,,	£130	,,
,,	,,	325	,,	£135	,,
,,	,,	350	,,	£140	,,
,,	,,	375	,,	£145	,,
,,	,,	400	,,	£150	,,

The Local Government Board, therefore, request that the County Council, unless they have otherwise agreed with their assistant surveyors, will be good enough to arrange for the payment of their salaries upon this scale from the 1st of April last.

The Board are of opinion that an assistant surveyor's district should not include if possible an extent of roads greater than 250 miles, and that under no circumstances should an assistant surveyor be required to take charge of a district with an aggregate mileage exceeding 400.

I am, sir, &c.

The sealed order was in the following form:—

We, the Local Government Board for Ireland, in exercise of the powers vested in us by sub-section 18 of section 115 of the Local Government (Ireland) Act, 1898, do hereby order and determine that Patrick Leary, assistant surveyor in the county of Wexford, being an existing officer transferred by the said Act to the Council of the said county, is entitled under the above-cited sub-section of the said Act to

receive, as from the 1st day of April, 1899, an increase of remuneration amounting to £70 per annum.

Sealed with our seal this 5th day of July, in the year of our Lord, 1900.

(Signed),

H. A. ROBINSON.
R. BAGWELL.

And the letter of 6th July was in these terms :—

SIR,—I am directed by the Local Government Board for Ireland to inform the County Council of Wexford that the Board have received communications from Messrs. J. P. Murphy, P. Leary, and W. H. Jones, assistant surveyors in the county, in which they state that the County Council have declined to pay them the salaries due to them according to the scale fixed by the Board in February last, a copy of which was sent to the Council on the 23rd of that month.

These assistant surveyors have represented the matter to the Local Government Board, and under the circumstances the Board have issued special orders under seal to enable Messrs. Murphy, Leary, and Jones to recover the amount payable to them according to the scale.

Copies of these orders are enclosed, but the Board trust that the Council will not involve themselves in legal costs in opposing the rights to which their officers are entitled under Act of Parliament. The Board have suggested to these officers that they should defer taking proceedings pending the next meeting of the Council.

I am, &c.

The County Council obtained a conditional order for a writ of *certiorari* to quash this sealed order at the same time as they obtained the order in *Webster's Case*. This conditional order was obtained on an affidavit by Mr. Pigott similar to that in *Webster's Case*. An affidavit by Sir Henry Robinson was filed as cause against this conditional order, of which the following is the material portion :—

7. For the purpose of enabling them to discharge their duty in respect of such claims for increase of salaries under the Local Government Act, the Board fully inquired into the effect of the said Act on the duties of existing officers generally, including assistant surveyors, all over Ireland, and in the prosecution of such inquiries the Board had the assistance of highly qualified Government officials who were perfectly familiar with the duties of assistant surveyors under the Grand Jury system as well as under said Local

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Government Act. The members of the Board also by reason of their position and duties both before and after the passing of the Local Government Act had ample knowledge of the work done by assistant surveyors under the Grand Jury system and to be done by them under said Act, and they had also the benefit of numerous communications on the matter with other County Councils in Ireland. The said investigations were carried out by the Board independently altogether of any statements or claims made by existing officers (including assistant or deputy county surveyors) or by any association or body purporting to act on their behalf, and no statement or claim was acted upon by the Board, save in so far as it was verified and established by actual investigations.

8. As a result of the inquiries and investigations referred to in the last preceding paragraph hereof, the Board came to the conclusion that the duties of assistant surveyors generally had been necessarily increased by reason of the said Local Government Act, and as the duties of assistant surveyors generally had been necessarily increased by reason of the said Local Government Act, and as the duties of assistant surveyors are practically of a similar nature in each of the counties in Ireland, the Board, with infinite care and labour, and having due regard to the former salaries and duties of assistant surveyors, and the duties which they are now bound to perform under the Local Government Act, and the proportionate increase thereof, prepared a scale of remuneration which they considered would be fairly applicable to all assistant surveyors, and which would serve as a guide in fixing the remuneration to be henceforth paid to such officers.

9. On the 23rd February, 1900, as stated in the second paragraph of Mr. Pigott's affidavit, the Board sent to the said County Council the circular embodying said scale, and requested the County Council to arrange for the payment of assistant surveyors' salaries in accordance therewith.

10. As appears from the affidavit of Mr. Pigott, the said County Council declined to make any increase whatever in the salaries of their assistant surveyors, and I refer to the recommendations, correspondence, and resolutions on the matter set forth in the fifth and sixth paragraphs of said affidavit. I respectfully submit that it appears from said recommendations and resolutions that the judgment of the County Council in the matter was mainly controlled by the feeling that the old salaries were ample, irrespective altogether of any increase in the duties of said officers.

11. In addition to the general inquiries and investigations referred to in the earlier part of this affidavit, the Board, after having been informed by the said Patrick Leary that he declined to accept the salary resolved upon by the County Council as aforesaid, also investigated the particular claims of the said Patrick Leary, such investigation being wholly independent of any statements put forward by him or on his behalf, save in so far as same were verified by complete inquiry. As a result of this investigation, the Board decided that the duties of the said Patrick Leary as such assistant surveyor had been

increased by reason of the Local Government Act, and determined that his remuneration should be increased by the sum of £70 per annum, such increase being proportionate to the increase of his said duties, as determined by the Board. As the County Council persisted in their refusal to increase the remuneration of said Patrick Leary, either in accordance with the before-mentioned scale or at all, the Board issued the sealed order dated the 5th day of July, 1900, referred to in Mr. Pigott's affidavit.

12. It is utterly erroneous to state that the said decision of the Board was arrived at on *ex parte* statements or information. On the contrary, as hereinbefore stated, it was arrived at after complete and independent investigation by the Board, wholly irrespective of the statements of any interested parties, save in so far as these were verified by such investigation.

13. It is also erroneous to state that the said decision was arrived at in total disregard of the special circumstances of the county Wexford. These were fully considered by the Board. The districts of the assistant surveyors in Wexford are amongst the largest, if not the largest, in Ireland. An assistant in the county has charge of 450 to 500 miles of road (the roads under the charge of said Patrick Leary were certified to the Board by the county surveyor of Wexford as being 554⅓ miles), and to inspect these properly four times a year, instead of twice as formerly, in itself and apart from all other increases of duty, involves a very great increase both to the duties and expenses of the assistant surveyors as compared with their duties and expenses under the Grand Jury system.

14. I further say that the several matters referred to in the aforesaid resolutions and minutes of said County Council were in fact considered by the Board in determining whether or not there had been any increase of duties devolving upon the assistant surveyors of Wexford by reason of the said Act, and the Board are still of opinion that the increase of salary determined upon by them in the case of said Patrick Leary is equitable and fair, having regard to the increased duties which he is now bound to perform.

15. I respectfully submit to this Honourable Court that the Board in determining as aforesaid acted within the powers and jurisdiction conferred upon them by law in that behalf.

The County Council moved to make absolute the conditional order notwithstanding the cause shown, and by two several orders on 1st December, 1900, the Queen's Bench Division (Lord O'Brien, L.C.J., Gibson, Madden, and Barton, JJ.) allowed the cause shown, and discharged the conditional orders.

From these two orders the County Council appealed to the Court of Appeal (Palles, C.B., Fitz Gibbon, Walker, and Holmes, L.JJ.).

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Healy, K.C., and *Clancy*, for the appellants.

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Ronan, K.C., and *Matheson, K.C.*, (with them *Chambers*), for the Local Government Board.

Hume, K.C., and *Battersby*, for the County Surveyor.

[The following cases were cited:—*In re The Local Government Board: Ex parte Byrne and James* (1); *Macbeth* v. *Ashley* (2); *The Queen* (*Dillon*) v. *The Local Government Board* (3); *The Queen* (*Dixon*) v. *The Local Government Board* (4); *The Queen* (*M'Evoy*) v. *The Corporation of Dublin* (5); *In re The Local Government Board: Ex parte Kingstown Commissioners* (6); *The Queen* (*Newell*) v. *Local Board of Health of Hastings* (7); *Cooper* v. *The Wandsworth Board of Works* (8); *The Queen* v. *Cheshire Lines Committee* (9); *Capel* v. *Child* (10); *The Attorney-General* v. *Hooper* (11); *The Queen* (*Cleeland*) v. *The Pharmaceutical Society* (12); *Newry and Enniskillen Railway Company* v. *Ulster Railway Company* (13); *Livingstone* v. *Rawyards Coal Company* (14); *The Queen* (*Lord Powerscourt*) v. *County Court Judge of Tyrone* (15); *The Queen* (*Blakeney*) v. *Justices of Roscommon* (16); *Ryan* v. *Goddard* (17).]

Cur. adv. vult.

Feb. 25.

PALLES, C.B.:—

These are appeals from orders of the Queen's Bench Division, discharging conditional orders for writs of *certiorari* to bring up certain orders of the Local Government Board, whereby, in intended exercise of their powers under sect. 115, sub-sect. 18 of the Local Government Act, 1898, the salaries of the county surveyor and assistant surveyors of the county Wexford were increased.

(1) 14 L. R. Ir. 395.
(2) L. R. 2 H. L. (Sc.) 352.
(3) 14 L. R. Ir. 186.
(4) 2 L. R. Ir. 316.
(5) 2 L. R. Ir. 371.
(6) 16 L. R. Ir. 150.
(7) 6 B. & S. 401.
(8) 14 C. B. (N. S.) at p. 189.
(9) L. R. 8 Q. B. 344.
(10) 2 Cr. & J. 558.
(11) [1893] 3 Ch. 483.
(12) [1896] 2 I. R. 368.
(13) 8 De G. M. & G. 487.
(14) 5 App. Cas. 25.
(15) 10 L. R. Ir. 217.
(16) [1894] 2 I. R. 158.
(17) 15 I. L. T. R. 103.

The arguments of the counsel for the Local Government Board in this Court and before the Queen's Bench Division may be distributed under two heads:—(1) they insisted that the determinations of the Board, as to the amounts of salary under this enactment, were not *judicial* acts, in respect of which writs of *certiorari* could go; and (2) that, even if they were, the actual determinations made were within jurisdiction.

The first head of argument again divided itself into two. It was insisted in the first place (and it is this which renders the decision of these appeals important) that the Local Government Board was a Government administrative department, created for administrative purposes only, and that having regard to this character, *certiorari* would not lie to bring up any of its determinations, although the words of the enactment creating the power or jurisdiction under which such determinations purported to be made might be such as, if used in respect of a body of a different character, would be construed as conferring a judicial power; secondly, that even if, in respect of some of its determinations, *certiorari* might go against the department, the words in sect. 115, sub-sect. 18, having regard to the scope of the entire Act, showed that determinations within that sub-section were not intended by Parliament to be judicial.

The Queen's Bench Division were of opinion that the Local Government Board was not, by reason of its character, exempt from having its determinations, if of a judicial nature, reviewed upon *certiorari*, and that a determination by it, under the jurisdiction conferred by sect. 115, sub-sect. 18, was judicial. They were, however, further of opinion that the determinations in question were made within jurisdiction, and for that reason they refused the writs.

When the appeals were being opened before us, the counsel for the Local Government stated that their clients were desirous of their proceedings being reviewed by the High Court and by this Court, and that accordingly they had been instructed not to insist that *certiorari* would not lie in the present cases. As, however, the matter was one upon which our jurisdiction rested—especially as in the opinion of one of the learned Judges in the Queen's Bench Division it was involved in some doubt—we were

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of opinion that it, as well as the other matters in controversy, should be argued before us; and out of deference to this opinion the question was argued, and argued elaborately and most ably, by Mr. Ronan and Mr. Matheson, who appeared for the Board.

This Board was constituted by the Act 35 & 36 Vict. c. 69, by sect. 2 of which all the powers and duties of the former Poor Law Commissioners, and also those of the Lord Lieutenant, under certain specified Acts, including the Towns Improvement Act (17 & 18 Vict. c. 103) were transferred to the new Board, and were directed to be performed by them (except as otherwise provided by the Act) subject to the same conditions, liabilities, and *incidents* as existed prior to the Act.

By the Irish Poor Relief Act, 1838 (1 & 2 Vict. c. 56), which was one of the statutes regulating the procedure of the former Poor Law Commissioners (whose powers were thus transferred to the Local Government Board), it is enacted in sect. 114 "that no order of the Commissioners or Guardians made under the powers of" that Act "shall be removed by writ of *certiorari* into any Court of Record, except the Court of Queen's Bench, and that every order, the legality of which shall be called in question in any other legal proceeding, shall, nevertheless, until the same be declared illegal by that Court, continue in full force and virtue, as if the legality thereof had not been called in question."

There is no doubt, therefore, that the inherent character which the Local Government Board acquired at its very birth, so far from indicating freedom from its proceedings being, in fit cases, reviewed by *certiorari*, involved liability to that procedure in the exercise of one of the largest and most important classes of its powers and duties, viz. those derived from the former Poor Law Commissioners.

I have already stated that, amongst the powers transferred to the Local Government Board upon its formation, were the powers of the Lord Lieutenant under the Towns Improvement Act of 1854 (17 & 18 Vict. c. 103). By sect 15 of that Act the Lord Lieutenant was empowered (if he approved of a resolution to adopt the Act which had been passed at a meeting of a certain prescribed class of ratepayers of a town, held in accordance with the previous sections of the Act, and duly certified to his Excellency) to notify

his approbation thereof, to fix the number of Commissioners to be elected for carrying the Act into execution in such town, and to cause notice of such approbation to be published in the *Dublin Gazette*; and the section then proceeded to enact that "from and after a day to be named in such notice in that behalf, either the whole of this Act, or the portion thereof so adopted and approved, shall be applicable to, and in force in such town." The word "town" in that Act was, by sect. 1, defined to mean "a city, town corporate, borough, market town, or other town in Ireland, containing a population of 1500 inhabitants or upwards," ascertained as therein mentioned.

In the year 1878 the Queen's Bench Division had, in *The Queen* (*Dixon*) v. *Local Government Board* (1), to determine whether a writ of *certiorari* would lie to bring up an order of the Local Government Board, purporting to be made under the powers contained in the section of the Towns Improvement Act, which I have read, putting in force that Act in a town which had not 1500 inhabitants, ascertained in the manner prescribed by sect. 1. The application for the writ there was heard by May, C.J., and Fitz Gerald, J., afterwards Lord Fitz Gerald. It was argued by the Local Government Board, as it has been argued here, that the order of the Board was merely of a ministerial character, and was not such a judicial act as could be reviewed upon *certiorari*. The Court, however, held the contrary, and directed the writ to issue. It has been argued by Mr. Ronan that this decision was erroneous, and we are now asked to overrule it, upon a ground apparently not suggested there, that as the power, in the exercise of which the order under consideration there purported to be made, was one derived by the Local Government Board by transfer from the Lord Lieutenant, to whom, undoubtedly, a writ of *certiorari* could not go, the Board also, as his transferee, was exempt from liability to the writ, as under the Act 35 & 36 Vict. c. 69, sect. 2, it was to exercise the powers, "subject to the same *incidents* as theretofore."

In my opinion the word "incidents," controlled as it is by the previous words, "except as otherwise provided by this Act," does

(1) 2 L. R. Ir. 316.

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not include the personal immunity from *certiorari* of the Lord Lieutenant as representative of the Sovereign. Although the exception is not by express words provided in the Act, it is involved, and therefore impliedly provided for, in the transfer of powers from the Viceroy to persons, capable of being reached by the writ; and I should have been of the same opinion even if the Act had not contained the words of exception I have referred to.

I desire, however, to state that, even were the question one which, if *res nova*, I should be inclined to decide the other way, even were the lapse of time since the decision much less than it has been, yet as the Act whose construction is in question passed in the interval, I should decline to review that decision for the purpose of arriving at the construction of that Act, as it must be presumed to have been passed with full knowledge in the Legislature of the decision in question, and consequently of the character, as judicially determined, of the body which by it was being invested with new powers. The importance which I attach to the case is derived, not so much from its soundness in law (although that, as I have already said, I do not doubt), as from the fact that it was a *decision* to the effect I have stated, and that it must be deemed that the subsequent legislation was upon its basis.

I may further be permitted to add that, considering that, at that time, the order was an appealable one, and the question determined important, involving as it did the liability of a Government department to have its orders reviewed, it is hardly to be believed that the eminent counsel who appeared in the case for the Local Government Board, and who included our colleague, Holmes, L.J., would have rested satisfied with the decision if, in their opinion, it was erroneous.

It is, perhaps, right to add, although it hardly gives any additional force to what I have already said, that the question whether the exercise by the Local Government Board of certain powers under the Public Health Act, 1878, to make Provisional Orders was judicial or ministerial, came, in 1885, before the late Exchequer Division (of which I was then a member) in *In re the Local Government Board; Ex parte the Kingstown Commissioners* (1),

(1) 16 L. R. Ir. 150; in C. A. 18 L. R. Ir. 509.

that it was there held that such exercise was not ministerial, and that it was distinguished from a judicial act only by reason of orders under that jurisdiction lacking the incident essential to a judicial decision of *in se* imposing liability or altering rights. This arose from the circumstances of the Provisional Order being without effect until confirmed by Parliament. This decision also must be deemed to have been known to the Legislature when the Act of 1898 was passed.

Coming now to the statute of 1898 itself, there is one section which *per se*, and without any elaborate consideration of each of the separate provisions of the Act, demonstrates, to my mind, that the Legislature, in enacting it, recognised (which, indeed, without it would have been evident from what I have already stated) that the Local Government Board was a body whose functions were not merely ministerial, that it was capable of exercising, and did exercise, judicial or *quasi*-judicial functions, and that the Act intended that some of the new powers to be conferred upon it should be of that character. I refer to sect. 101, sub-sect. 3:—"Any difference which, under any enactment applied by an Order in Council under this Act, can be referred to the High Court, may, if the parties to such difference so agree, be referred to and decided by the Local Government Board." It is unnecessary to refer in detail to the particulars of all the enactments capable of being applied, and under which differences might be referred to the High Court. It is sufficient to mention one—sect. 70, sub-sect. 1, of the Local Government Act, 1894:—"If any question arises or is about to arise as to whether any power, duty, or liability is or is not transferred by or under this Act to any parish council, parish meeting, or district council, or any property is or is not vested in the parish council, or in the chairman and overseers of a rural parish, or in a district council, that question, without prejudice to any other mode of trying it, may, on the application of the council, meeting, or other local authority concerned, be submitted for decision to the High Court, in such summary manner, and subject to any rules of Court, as may be directed by the Court, and the Court, after hearing such parties, and taking such evidence, if any, as it thinks fit, shall decide the question." Sub-sect. 3:—"An appeal shall, with the

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leave of the High Court or Court of Appeal, but not otherwise, lie to the Court of Appeal against any decision under this section." It is obvious that the matters authorized to be referred to the Board by this sub-section include matters which are eminently of a judicial character, and in my mind it makes no difference, as regards the character of the determination upon such a reference, that it must be by agreement. Although a reference by agreement, the decision, when made, does not operate as an award *inter partes*, but has effect under the Act, and by its own force creates liabilities and alters rights.

Again, the powers granted to the Board, in respect of the discharge of all its powers under the Act, ought not to be lost sight of in the consideration of the general question whether the Legislature intended that none of the proceedings of the Board, under its new powers, should be of a judicial character. Article 32 of the Application of Enactments Order provides that, in cases where the Board are authorized to make any order, or give any consent, or otherwise to act under the Act, they may cause a local inquiry to be made, and, under sect. 213 of the Public Health (Ireland) Act, 1878, which is made applicable, witnesses on oath may be examined at such inquiry; and under sect. 210 of the same Act, and subsect. 3 of the last-mentioned article, the Board may direct the costs of the inquiry to be paid by councils and other authorities concerned therein, and may make orders as to the parties by whom, or rates out of which, the same shall be paid; and such orders may be made rules of the High Court.

Adding to this that there is no clause in the Act taking away *certiorari*, and bearing in mind the principle of the common law that requires express words, or an implication equally clear, to effect this purpose, it seems to me that it would be heaping Ossa upon Pelion to refer to any of the many other considerations arising upon the Act to aid in demonstrating that, instead of disclosing an intention that this Board shall be free from the lot of all inferior judicial tribunals (not specially exempted) of being subject to *certiorari*, it indicates an affirmative intention to the contrary.

I have not overlooked the consideration that several of the powers of the Board under the Act are so wide as to make it prac-

tically impossible that a *certiorari* could issue to review determinations thereunder, once it is assumed that the Board—as the tribunal for their exercise—has been properly constituted. As examples of those powers, all of which have been carefully considered by the Court since the argument, may be mentioned those conferred by sect. 2, sub-sect. 3, which provides that the numbers of councillors and the county electoral divisions shall be those provided by the Local Government Board: sect. 49, which authorizes the Board to determine the standard rate at which poor rate and county cess are respectively to be taken to have been theretofore levied; and sect. 115, sub-sect. 15, which enables the Board to approve of a scheme "with or without modifications." The difficulty of reaching by *certiorari* determinations under those powers, assuming all of them to be judicial (a matter which seems to me not free from doubt, but which I deem it unnecessary to discuss), would be because they are so wide that it would be difficult, if not impossible, to show that any particular decision was in excess of jurisdiction; but if we take the graver cases, in which a *certiorari* is sought to impeach the competence of the tribunal for bias, for interest, or for other kindred reasons, I am of opinion that, even in relation to the exercise of these powers, provided they were judicial, *certiorari* would undoubtedly lie.

Upon these grounds, which are in substance those given by Lord O'Brien, L.C.J., in his judgment in the Queen's Bench Division, I unhesitatingly agree with the decision of that division upon this first question, and hold that the Local Government Board are not exempt from the writ of *certiorari*.

Our next inquiry is whether the jurisdiction conferred upon the Board by the particular enactment under which they made the orders sought to be impeached is a judicial or a ministerial one. I advisedly refrain from adopting the word "administrative," so persistently used by Mr. Ronan. I do so, because I do not understand the sense in which it is used, if it is suggested that it differs from "ministerial"; whilst, on the other hand, if the two expressions are to be deemed synonymous, I prefer "ministerial," as one whose legal force is more accurately known in law. Examining, then, the sub-section in question, I agree with Gibson, J., that it is a condition precedent to the exercise of jurisdiction in the Local

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Government Board, that the person whose remuneration is ordered to be increased or diminished shall be an "officer" within the meaning of the enactment, and that the question whether he does or does not fill that character is a matter open for discussion and determination on an application for a mandamus to enforce the order, or in an action. I also concur with Gibson, J., in declining to determine whether the fact that the officer's duties have been increased is a condition precedent to jurisdiction, so as to be capable of being agitated thereafter. I rather think that it is not, and that the decision of the Board of the fact that there has been an increase of duty is as conclusive as undoubtedly would be their determination as to the amount of remuneration for that increase, were that determination arrived at by the mode directed by the statute. The increase is to be "in proportion to the increase of duties"; and for its determination it is therefore necessary to consider and determine (1) what duties were actually performed by the officer before the Act; (2) whether those duties were, upon the true construction of the Grand Jury Acts, imposed upon that officer; (3) whether they were the only duties which, under those Acts, he was liable to perform; (4) what was his remuneration for these duties, a question which, if any fees have been customarily received in addition to the salary, would involve the consideration of their legality; (5) what would be the new duties, which, upon the true construction of the Act of 1898, and the orders made thereunder, the officer would in future be bound to discharge. A decision under the enactment, therefore, necessarily involves the determination of matters of fact and of law by the exercise of judgment.

The determination of the Board (involving the consideration of all these matters) as to the amount of the increase of duties and fixing the increase of remuneration in due proportion to the increase of duties so determined, if made within jurisdiction, will bind the Council, and impose liability upon them, whether the amount so determined be right or wrong. If, for instance, to take an assumed case (which it is not likely could occur, but which I take as an example), the increase in duties was, in fact, 20 per cent, and the Board honestly, but erroneously, determined that it was 50 per cent., and accordingly determined that the increase

of remuneration should be a sum equal to 50 per cent. of the former remuneration, that decision would bind the Council. In other words, the validity and force of the order depends not on the fact as it actually exists, but on the fact as *it is determined to exist*. This shows that the determination is judicial.

Lord O'Brien, L.C.J., in determining that the decision was a judicial one, approved of and adopted a principle which May, C.J., twenty-two years since, in *The Queen* v. *Corporation of Dublin* (1), made his *ratio decidendi*. The decision there was concurred in by Lord Fitz Gerald, who did not express any dissent from the principle upon which the Chief Justice acted.

"It is established," says May, C.J. (2), "that the writ of *certiorari* does not lie to remove an order merely ministerial, such as a warrant; but it lies to remove and adjudicate upon the validity of acts judicial. In this connection the term 'judicial' does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law; but, for the purpose of this question, a 'judicial' act seems to be an act done by competent authority, upon consideration of facts and circumstances, and *imposing* liability or *affecting* the rights of others."

This rule is criticised by Gibson, J., in his judgment in the present case, and, as I have arrived at my conclusion upon the consideration of the particular enactment in question here, it is not absolutely necessary for me to discuss the general rule; but as I often find a difficulty in determining whether a matter is within a particular class, without presenting, to my own mind at least, a clear conception of the elements essential to that class, I have no hesitation in saying that I have always considered, and still consider, the principle of law to be as stated by the Chief Justice, assuming that there is nothing in the statute constituting the particular tribunal or investing it with the particular power which indicates a contrary intention. I have always thought that to erect a tribunal into a "Court" or "jurisdiction," so as to make its determinations judicial, the essential element is that it should have power, by its *determination* within jurisdiction, to impose liability or affect rights. By this I mean that the liability is

(1) 2 L. R. Ir. 371. (2) 2 L. R. Ir. at pp. 376, 377.

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imposed, or the right affected by the determination only, and not by the fact determined, and so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact. It is otherwise of a ministerial power. If the existence of such a power depend upon a contingency, although it may be necessary for the officer to determine whether the contingency has happened, in order to know whether he shall exercise the power, his determination does not bind. The happening of the contingency may be questioned in an action brought to try the legality of the act done under the alleged exercise of the power. But where the determination binds, although it is based on an erroneous view of facts or law, then the power authorizing it is judicial. It may be proper to state that, of course, the correlative proposition is not universally true. A judicial act by an inferior Court does not always bind even the parties to it. To do so it must be within jurisdiction, and, therefore, if the determination be as to the limits of its jurisdiction and be erroneous, so that the act is in excess of jurisdiction, it will not bind.

In the cases referred to by Gibson, J., in *Reg.* v. *Poole Corporation* (1), in *Sandwich Corporation* v. *Reg.* (2), and in all the cases of the same class, the question in controversy was whether the applicants were persons who had been removed from their office under the provisions of the 5 & 6 Wm. 4, c. 76, s. 166, because it depended upon this—whether the Treasury had jurisdiction to entertain the applications for compensation. The existence of the power, not its exercise, was impeached. Such a question is always properly cognizable on mandamus: *Reg.* v. *Sheehan* (3), (to which I myself was a party), and the case upon the authority of which it was decided: *Reg.* v. *Omagh Union* (4), were decided upon the very distinction I have taken. They distinguished between on the one hand (*a*) the surcharge by an auditor on a person who made an illegal payment, the certificate of which is a judicial or semi-judicial determination of the fact, and, therefore, conclusive *upon the person surcharged* and the subject of a writ of *certiorari;* and, on the other, (*b*) the general

(1) 7 A. & E. 730.
(2) 10 Q. B. 563.
(3) [1898] 2 I. R. 683.
(4) 26 L. R. Ir. 619, *per* Holmes, J., at p. 625.

examination of the accounts of a union "by the same auditor," as to which "there is nothing to warrant the notion that the certificate . . . amounts to a conclusive *determination* that everything contained therein is absolutely correct, or to anything more than that he has failed to discover a mistake." This is, in the first case, the determination binds, therefore it is judicial; in the other, it does not; therefore it is not judicial.

There was much argument both here and in the Queen's Bench grounded upon the assumption (which it is stated was admitted by The Mac Dermot) that the Lords of the Treasury were exempt from *certiorari*, and reasons are adduced by the learned Judges to differentiate their position in reference to that writ from that of the Local Government Board.

I must disassociate myself from any such assumption. I cannot admit that the Treasury would be exempt from *certiorari* if they exceeded their jurisdiction in the exercise of a judicial power conferred upon them by the Local Government Act, and thereby imposed a liability upon a County Council.

If, for instance, a case shall come before us in which in determining a superannuation allowance to be granted to a retiring secretary of the Grand Jury, under the power conferred by section 115, sub-sect. (6), the Treasury took into consideration as part of that officer's remuneration the amount of fees which he had customarily received, but which on the true construction of the Grand Jury Act were not legally payable, I must hold myself free to consider whether the case would be one for *certiorari*.

The reason why there are no cases in the books as to *certiorari* to the Treasury in reference to pensions is not far to seek. The Superannuation Acts contain an express provision that the decision of the Treasury is conclusive, and, as a general rule, pensions are granted *ex gratia*, not *ex debito justitiae*.

There remains the second question—Were the orders of the Local Government Board made within their jurisdiction? In the Queen's Bench three grounds were relied upon as showing that they were in excess of jurisdiction. It was said (1) that a previous inquiry, under the Application of Enactments Order, sect. 32 (1), was a condition precedent to their jurisdiction to determine; (2) that the order was made in disregard of natural justice,

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because the Council had not a proper opportunity of hearing what was alleged against them, and of being heard in reference to it; and (3) that the actual decision was based upon a wrong principle.

Of these three grounds, the first has not been argued; and I am entirely satisfied that the Queen's Bench Division were right in their judgment that there was no duty on the Board to hold such an inquiry, although they had the power to do so if they thought fit.

The second ground raises a question so important, and, I may add, in my mind, of such difficulty, that I prefer not to express any opinion in reference to it in a case in which it is not essential to do so. The view which I have taken upon the remaining ground renders it unnecessary for me to consider this second ground, and I therefore pass from it.

This brings me to the third ground: that the decision was based upon a wrong principle. I cannot think that the arguments in this Court, upon this part of the case, were identical with those which were presented in the Queen's Bench Division. I gather from the judgment of Mr. Justice Gibson that the ground of impeachment there relied on was that the determination proceeded on the application of a pre-determined general scale, without due consideration of the facts and circumstances of the particular case; and, no doubt, that argument was *one* of those presented to us upon this portion of the case. It was, however, further argued before us that the matter determined by the Board was a matter different from that which they had jurisdiction to determine. Their jurisdiction, it was rightly said, was to determine increase of remuneration in proportion to increase of duties. What they did determine, it was alleged, was the total amount of remuneration for *all* duties, including those which were performed before the Act. It is clear, indeed it is admitted, that if they did this they exceeded their jurisdiction; and thus this question is reduced to one of fact only. Let us, therefore, see what was the action of the Board in the matter.

The relevant materials before us are four letters of the Board, viz. those of the 7th and 23rd February, 27th June, and 6th July, and the affidavits of the Vice-President, Sir Henry Robinson.

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It was suggested by Mr. Matheson that the letters of the Board were inaccurate, having been written hurriedly, in consequence of an alleged insufficiency of the staff. The affidavits, however, of Sir H. Robinson do not allege, or even hint at, any such mistake; and it is to be remembered that they were filed in answer to affidavits on the part of the prosecutors which referred to and relied upon the letters in question. Such a statement, before I could act upon it, should be supported by clear and satisfactory evidence, and of such evidence I do not find a trace. I consequently feel myself coerced to hold that they truly represent the action of the Board.

First, then, I take the case of the assistant surveyors. The letter of the 6th of July states that the *salaries* of these gentlemen were determined "according to the scale fixed by the Board in February last, a copy of which was sent to the Council on the 23rd of that month;" and that the sealed orders were issued to enable the assistant surveyors to recover the amounts payable to them *according to the scale.*

The letter of the 23rd February, thus referred to, is, in my mind, the most important document in the case. After stating that the Local Government Board had under consideration the claims for increased remuneration for increased duties, made to them under sect. 115, sub-sect. 18, of the Act by the assistant surveyors who had failed to come to an agreement with the County Councils on the matter, and that the Board had carefully considered the representations received from the County Councils and their officers, and had also before them a memorandum by the assistant surveyors, assigning the nature of the increased duties devolving upon them under the Act, this letter proceeds as follows:—"It appears that the length of roads in assistant surveyors' districts varies, except in a very few cases, from 200 to 500 miles; and in considering the claims of these officers the Local Government Board have come to the conclusion that the mileage in each assistant's district should be taken into consideration in determining the *salary* of these officers, but that *no salary should be less than* £120 *a-year.* The Board have accordingly decided that the *salaries of all* existing assistant surveyors should be increased, and should be fixed according to the following *scale in all cases* where an agree-

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ment has not been arrived at." Then follows the scale, the first item of which is, "District not exceeding 250 miles, £120 a-year;" and the last, "District not exceeding 400 miles, £150 a-year."

There is no doubt that, in the case under consideration, viz. *Leary's Case*, the increase of salary was arrived at by deducting his former salary of £80 a-year from the £150 fixed by the scale. Thus, what they have fixed is the total salary, and not the increase of salary. The difference is not a technical one. In determining, as they have done, the salary, as distinguished from the increase of salary, a material element must have been the remuneration which ought to be received for the duties which those officers performed before the Act; but the Board had no power to determine this. The Act of Parliament did not confer upon them any power to determine whether the existing salaries of officers were too small or were too large. In their inquiry they were bound to limit themselves to the determination of the remuneration for the increase of duties; they had no power to consider whether the former salary was or was not adequate remuneration for the former duties. It inevitably follows that the action of the Board, as described in this letter, was in excess of their jurisdiction.

The answer presented by the counsel for the Board to this view is that the affidavit of Sir H. Robinson shows that the Board did not do what it is stated in this letter it did do. The statement of Sir Henry Robinson is in these words:—"As the result of this investigation, the Board decided that the duties of the said Patrick Leary as such assistant surveyor had been increased by reason of the Local Government Act, and determined that his remuneration should be increased by the sum of £70 per annum." So far this statement is not inconsistent with the £70 having been arrived at by first ascertaining the entire salary, and then deducting from it the former salary. Then the affidavit proceeds to add these words, "such increase being proportionate to the increase of his said duties as determined by the Board."

These words are consistent with that which is deposed to being matter of opinion and legal construction, and distinguished from matter of fact. I conceive that I am bound to give them, if possible, a construction consistent with the letter of the 23rd of February, and I think that consistency will be found by reading

those words as containing matter of opinion, and Sir H. Robinson's view of the construction of the Act, as well as matter of fact. I read them thus: Having ascertained the sum of £70 in the mode stated in the letter, viz. by first arriving at the sum of £150 as proper remuneration for all Mr. Leary's duties, and deducting from that £80, his former salary, the difference, £70, is, in my opinion, upon the true construction of the Act, proportionate to the increase of his said duties as determined by the Board. Such a construction, however, is not the true construction of the section; and in acting in the mode in which I am of opinion the Board did act they have exceeded their jurisdiction; and in respect of these officers I think it quite clear that the writ of *certiorari* should go.

As to the county surveyor, Mr. Webster, the ground of impeachment upon which I have based my judgment in *Leary's Case* as to the mode in which the salary was arrived at is not quite so clearly made out. That mode does not appear as clearly from the letters of the Local Government Board in his case as it does in reference to the assistant surveyors; and the Board, within whose sole knowledge it is, have not thought it proper to bring it before us as fully as, in my opinion, was desirable. There is, however, enough to show that, as to the county surveyor, the Commissioners acted upon the same principle as governed them in their action as to the assistant surveyors. Their letter of the 27th of June refers to the "salary" of Mr. Webster as "due to him according *to the scale* determined by the Board on the 24th of January, 1900, under sect. 115, sub-sect. 18, of the Local Government (Ireland) Act, 1898, which was duly notified to the Council on the 7th February last." This letter of the 7th of February does not refer to any scale, nor have the Local Government Board told us to what scale they referred.

The prosecutors, however, are entitled to enter in evidence in *Webster's Case*, and to rely upon, the affidavit of Sir Henry Robinson in *Leary's Case*, and the letters of the 23rd February and 6th July, in reference to the assistant surveyors, to which I have already referred, and these documents, taken in connexion with the letters of the 7th February and 27th June, satisfy my mind that the Board acted upon the same principle as regards

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both county surveyors and assistant surveyors, and as to both determined the increase of salary by first determining *de novo* the salary for all duties, including those performed before the Act.

From their determination in *Leary's Case*, we know that the Board must have considered that this was the thing which the Legislature had directed them to do, and they did it in a mode fit and proper for fixing entire salaries *de novo*, viz. by considering the circumstances of each county, distributing them into classes, so that the circumstances of all counties within each class should be uniform, and appointing a uniform remuneration for each county within a class—in other words by a scale.

But such a mode of proceeding by scales is *prima facie* altogether inapplicable to fixing a sum which is to be "in proportion to" circumstances, or in fixing which circumstances are to be regarded when those circumstances must and may vary in almost every instance. In proceeding under the Act of Parliament, which contemplates the individualism of each county, *prima facie*, neither uniformity nor "scale" should have any place. We know from the letter of the 27th June that the determination in regard to the county surveyor must have been made, as was that in reference to the assistant surveyors, according to "scale," and that what was determined as regards each class was "the salary," which I distinguish from the "increase of salary." If there were any mistake in this why has it not been explained? If it be correct why have we not been told; what was the thing to which the scale referred: was it the "salary" or the "increase of salary"?

In the affidavit of Sir H. Robinson this scale is not once referred to.

Under these circumstances I infer, and I must say I infer without any doubt, that the scale referred to salaries and not to increase of salaries. The observations I have made as to the determination in *Leary's Case* are consequently applicable to *Webster's Case*, and I, therefore, hold, that in the latter the Board determined a matter wholly outside their jurisdiction, viz. the remuneration for the total duties of the officer, as well those existing before the Act as an increase of duties incident to the Act.

I am, therefore, of opinion that in *Webster's Case*, also, the *certiorari* should go.

There are two other questions which may hereafter arise upon the sub-sections we have under consideration, which I have not mentioned, and on which I desire to reserve any expression of opinion, viz.: (1) What is the true meaning of the words "in proportion," viz. whether the increase of remuneration is to bear the same proportion to the old remuneration, as the increase of duties bears to the old duties, or whether it means a proportion which shall be just in the opinion of the Board. (2.) Whether non-adherence to the proportion, whatever it may be, laid down by the Act, affects the jurisdiction of the Board so as to make a determination upon any other proportion void.

Neither do I express any opinion upon the question whether the order is bad on its face.

The respondents must, in accordance with the general rule of this Court, pay the costs of the appeal. Each party must abide his own costs in the Queen's Bench Division, as in *certiorari* there is no jurisdiction to give the costs in that Court to a successful prosecutor.

Lord Justice Walker, who is unable to be present to-day, has authorized me to say that he concurs in the conclusion at which I have arrived, for the reasons I have stated.

FITZ GIBBON, L.J.:—

I concur. Having been permitted to read the judgments of the Lord Chief Baron and of Holmes, L.J., I shall add only such observations as may help to make clear to those who are charged with the heavy burden of interpreting and administering the Local Government (Ireland) Act, 1898, the opinion of this Court upon the questions raised in the present case.

I shall not repeat details, nor travel over all the ground which is covered by the judgments of my colleagues.

It is impossible, consistently with principle or authority, to hold that the Local Government Board is wholly exempt from the jurisdiction of the High Court exerciseable by *certiorari*. The Lord Chief Justice states that it was contended in the Queen's Bench Division that the Local Government Board is "practically

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an administrative State Department, and not, therefore, subject to be reviewed by that Court." This contention cannot be maintained. It is unquestionably an executive department, with many and important ministerial and administrative power and functions. It has also many functions in which it is not subject to *certiorari*, not so much because the powers are non-judicial—for some of them are judicial, or at least quasi-judicial, in their character—but because the terms in which these powers are conferred, or their incidents, or other circumstances, show that the authority of the Local Government Board with respect to them was intended to be final or supreme. But, on the other hand, as the successors of the Poor Law Commissioners, and in acting under the Public Health Acts and the Towns Improvement Acts, and in some other instances, express legislation and express decisions show that the Local Government Board is, in certain provinces of its varied work, subject to *certiorari*. Thus, the question in the present case must be answered upon considering the Act of 1898, sect. 115 (18) alone, and there we have no universal rule, no express words, and no decision, to guide us. We must answer it upon first principles, applied to a new enactment. The question cannot be more simply put than in the words, "Is a determination of the Board under that section a *judicial act*"? This drives us to define the meaning of the word "judicial," when used as the test-word upon the applicability of *certiorari*. The word is ambiguous. It may mean "affecting the judgment." It sometimes means "involving an act of judgment"; for example, we speak of "judicial blindness." It sometimes means "pertaining to a judge"; for example, we talk of our "judicial robes." These senses will not do; they are too wide or too narrow. I venture to think that considering the nature of the writ of *certiorari* will bring us as near to a definition as we can safely get. More cannot be said, as our law is a human institution, not an exact science. *Certiorari* is the process by which the High Court controls the exercise of jurisdiction by inferior Courts. For our purpose "judicial" must include juridical. Lord Esher, in a case of prohibition (1), said:—"Whenever the Legislature entrusts to any body of persons, other

(1) 10 Q. B. D. 317.

than the Superior Courts, the power of imposing an obligation on individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons, if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament."

May, C.J., in the case of the Corporation of Dublin, said:— "For the purpose of this question, a judicial act seems to be an act done by competent authority upon consideration of facts and circumstances, and imposing liability or affecting the rights of others"(1).

These statements have been criticised, but, as applied to the cases under consideration, I respectfully venture to say that they appear to me to be right. They were made in cases where the acts considered were done in the exercise, or assumed exercise, of *jurisdiction*, as distinguished from any other authority. Ministerial and administrative acts may be done by Courts as well as by others; they may involve consideration of facts and circumstances; they may impose liability and may affect rights; and yet such acts may not be controllable by *certiorari*. Therefore, the statements which I have quoted must be confined to acts involving the exercise, or assumed exercise, of some jurisdiction. This jurisdiction, in the present case, if it exists, must be conferred by sect. 115 (18); and in seeking it before I apply the law laid down by Lord Esher and May, C.J., I am neither correcting nor qualifying the language of those eminent Judges, but only ascertaining that their words apply to this case.

The same explanation, in somewhat different terms, seems to me to have been already given by the Lord Chief Baron in the *Kingstown Commissioners Case*, where he says that Lord Esher "translates the word 'Court,' and gives it its legal definition as 'a body of persons that have the power of imposing an obligation upon individuals'" (2)

In opposition to the word "judicial" the word "ministerial" has been adopted as the test-word to describe acts which are not the subject of *certiorari*. Mr. Ronan, for the Local Government Board, prefers "administrative." The truth is that neither of

(1) 2 L. R. Ir. 37. (2) 16 L. R. Ir. 159.

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these words is adequate as a descriptive term. A number of words would be required to describe all the acts, whether of judicial or non-judicial bodies, which cannot be controlled by *certiorari*. "Ministerial," "administrative," "executive," "discretionary," "final," "conclusive," are all terms applicable in different cases to describe such acts. I think that we must always ascertain affirmatively, before granting a *certiorari*, that the act to be reviewed is a judicial exercise, or assumed exercise, of a limited jurisdiction; and I can find no one word that will adequately describe all the acts which are not judicial, in the sense required, except the contradictory "non-judicial." Of other words, "ministerial" is as good as any; its use is sanctioned, and its meaning has been elucidated by authority. As so elucidated, "judicial" and "ministerial" conveniently describe the acts which are, and the acts which are not, subject to control by *certiorari*.

With this preface I read sect. 115 (18) to see the character of the determination which it empowers the Local Government Board to make. The subject of the power thereby conferred must be an "existing officer transferred under this section." Every such officer, "while performing the same or analogous duties, shall receive not less remuneration than heretofore." Over the remuneration of an officer who is performing the same or analogous duties the Local Government Board has no jurisdiction whatsoever. The Board's jurisdiction arises only "if by reason of anything done by or in pursuance of this Act his duties are increased or diminished." Thereupon, and in that case only, he becomes entitled to receive "such increase or diminution of remuneration . . . as the Local Government Board may determine." Therefore, before assuming jurisdiction, and as the condition precedent to its exercise, the Local Government Board must ascertain—first, that it is dealing with an "existing officer"; and, secondly, that the duties of that officer have been increased or diminished by the Act. After both these points have been ascertained, the exercise of the jurisdiction is limited by the further words that the increase or diminution of remuneration which is to be determined must be "in proportion to the increase or diminution of his duties." The Act expressly prescribes an

increase or diminution of duties as the necessary condition of the Board's intervention, and it implies that when the officer's duties remain the "same or analogous duties," the Board cannot act at all. Thus I arrive at the conclusion that the Board has no jurisdiction whatever over the remuneration for a *quantum* of duties which remains the same after the Act as it was before. The old work and the old remuneration are equally beyond the powers of the Board; and any attempt to meddle with either the one or the other must be an excess of jurisdiction. The Board has no authority whatever to determine that the old pay was too much, or was too little, for the old *quantum* of work. It had no jurisdiction to consider, or to act on, the representations which were made by the existing officers that before the Act they were "underpaid," and I cannot agree with the Lord Chief Justice when he says:—"We are all of opinion that under the section there was a paramount right in the Local Government Board to determine the amount at which the salary should be fixed."

Our inability to accept this proposition is the foundation of our reversal of the order appealed from. But we agree that the investigation of the subjects which I have mentioned, resulting in the ascertainment of an increase or diminution of duties, confers a jurisdiction to make a determination with respect to the remuneration of the officer, and this determination is a judicial act, and is a fit subject for *certiorari* if the statutory limits of the Board's jurisdiction have been overstepped.

The duty of the Local Government Board, as I understand it, was first to ascertain whether the *quantum* of the officer's duties had been increased or diminished. The amount of increase or diminution could not be ascertained without at the same time ascertaining the *quantum* of the old duties. When, but only when, that had been done, if there was an increase, the remuneration for it, or if there was a diminution, the deduction for it, could be determined. But in case of increase, the whole of the old *quantum*, and in case of diminution, so much of it as continued, had to be laid aside; and the old remuneration for it, neither less nor more, had to be laid aside also, being beyond the jurisdiction of the Board. *The difference* between the old duties and the new, and that *alone*, was the lawful subject-matter for the jurisdiction

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to determine how much that difference was worth—how much would be a fair remuneration for the increase, or a fair deduction for the diminution, as the case might be.

The words "in proportion to the increase or diminution" may be ambiguous; but it is only right for me to express my opinion that the Local Government Board has jurisdiction reasonably to interpret those words. While I think that it ought to have regard to what I may call "the old rate of pay" in determining the money value of the difference, I incline to believe that it could not be controlled by *certiorari* if it determined that an officer whose duties were increased should be paid at a more generous rate for the increase, if it thought that he was paid at an inadequate rate for his old duties. At the other side of the account, I could not hold that if the Board thought that an existing officer was overpaid for his old duties, it could determine to give him nothing for a proved increase; and if his duties were diminished, I should hesitate to hold that the Board could deduct more than a due proportion from his pay in respect of the diminution, on the ground that he was overpaid for the remainder of the old duties. I prefer, therefore, the construction which contemplates the determination of a *simple proportion* between the increase or the diminution itself and the sum to be fixed by the Board, to that which would make it obligatory to fix the new remuneration for the increase of duties at the same rate at which the old work had been paid for, by a sum in *compound proportion*, or by a calculation based on *percentages*. This latter construction would lead to the objectionable consequence that, wherever an existing officer was, in the judgment of the Board, either overpaid or underpaid for his old duties, the sum which the Board should determine in respect of the increase or diminution would necessarily carry on the same injustice into the amount to be paid or deducted in respect of the change of duties.

But we cannot now decide this question, nor decide whether *certiorari* would lie to control the Board upon it. Be that as it may, I am satisfied as a fact upon the evidence—and it is the ground of my decision—that the Board assumed a jurisdiction to consider the existing remuneration for the existing duties, and to lay down scales of payment for the future, which were to regulate

the pay for the old as well as for the new duties, where, as in all the cases before us, there had been an increase. In the case of the assistant surveyor, Leary, this was plainly done. It is hard to believe that the Act of 1898 can have doubled his work, and nothing appears to explain this doubling of his salary, except a determination to pay him more for his old work as well as for the new. The same principle seems to have been adopted in the case of the county surveyor, Webster, and there is no evidence to the contrary.

Upon this ground, and in this respect, I think that the orders now before us were made in excess of jurisdiction; and are, therefore, bad.

It is right for me to add that I do not hold those orders to be bad upon their face. In orders of this class—in analogy to Grand Jury Presentments—I think that the reference to the statute sufficiently shows the jurisdiction under which they purport to be made.

Lastly, it is only just to the Vice-President of the Board to say that I do not accept the criticisms made upon his affidavit. He nowhere repudiates the official documents which elucidate the proceedings of his Board, and the mode in which it approached the discharge of its duty. These clearly show that the Board considered that it had jurisdiction to deal indiscriminately with the remuneration for both the old and the new duties upon the same scale and upon the same principle. A contradiction between such documents and the affidavit of an officer responsible for them would indeed be deplorable, and a repudiation of them by Sir H. Robinson would be discreditable. I read the affidavit—framed, as it is, rather as a pleading than as a proof—by the light of these documents. They show that the Board thought that it had jurisdiction to consider the rate of remuneration for the aggregate of the old work and of the new alike, and to determine that *both* should in future be paid for at the same rate, and on the same scale, and to determine the remuneration for both by the same authority. In this I think it was wrong, and therefore I agree that the writs must go, because the principle of determination was wrong, so far as the old duties were concerned. This is quite consistent with the Vice-President's statement, which I unreservedly accept, that each

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case was separately considered and determined. But the process adopted may have led in every case, and in the case of the assistant surveyors it certainly did lead, to the imposition of larger salaries upon the County Council than would have been payable if the old *quantum* of work had been left to be paid for at the old rate fixed under the previous Acts. The Board converted section 115 (18) from being a protection of vested interests into an occasion for raising salaries all round, and this it had no jurisdiction to do.

I see no reason to differ from the decision of the Queen's Bench Division (though I am not clear that we have not jurisdiction to do so), that the several parties should abide their own costs in the Court below, but the Local Government Board as the unsuccessful party in this Court must, according to our practice, pay the costs of the appeal.

HOLMES, L.J.—

The great change made in local government in Ireland by the Act of 1898 could never have been successfully carried out without the assistance of a central authority, entrusted by the Legislature with the duty of supplementing in many important details the provisions of the statute and invested with authority to settle controversies and questions likely to arise in connection with the new administrative bodies.

Such an authority was forthcoming in the Local Government Board, which from the time it had been called into existence in 1872 had been the favourite resource of Parliament when it desired to have reforms in local administration carried out under central guidance or control. I do not purpose to consider the position of the Local Government Board in its general aspect. This has been done exhaustively in the judgment of the Lord Chief Baron; and as the little which I have to say is intended to be merely supplementary, I wish to confine myself to the provisions of the Act under which the sealed orders that form the subject of these appeals purport to have been made.

Section 115, like the rest of Part VIII. of the statute, deals with matters of a transitory character. Its object is to protect the interests of the existing officers of any authority whose business is transferred in pursuance of the Act to a County or District Council.

Officers coming within its terms are made officers of the new body in like manner as if they had been appointed by it; and then follow elaborate provisions as to their tenure, and their rights to superannuation and compensation.

Sub-section 18 deals with their salaries. It enacts that, save in so far as it is otherwise provided, every transferred officer "shall hold his office by the same tenure and upon the same terms and conditions as heretofore, and while performing the same or analogous duties shall receive not less remuneration than heretofore." Then comes the provision of crucial importance in the present litigation—that "if by reason of any alteration of boundary or other thing done by or in pursuance of the Act his duties are increased or diminished, the officer shall be bound to perform those duties, and shall receive such increase or diminution of remuneration in proportion to the increase or diminution of his duties as the Local Government Board may determine." The sub-section concludes with a proviso authorizing a County or District Council, subject to the approval of the Local Government Board, to make a special agreement with a transferred officer respecting the terms and conditions on which he may continue to hold his office, and the remuneration which he shall receive therefor.

It is impossible to read the whole of the sub-section without seeing its intention. It was to keep the transferred officer, as far as the altered circumstances would permit, in the same position as before, and to secure this by the decision of an independent and disinterested tribunal. It was impossible to provide that his duties should be unchanged. It was a necessary consequence of the new legislation that his work might be increased or diminished, and the policy of the statute was that his old remuneration was to be a fixed standard, to be altered only to the extent which such increase or diminution might require. The contrast between the final proviso and the preceding part of the sub-section is noteworthy. The proviso enables the Council and officer to make a special agreement as to the remuneration of the latter, subject to the approval of the Local Government Board. This agreement may be arrived at quite irrespective of the amount the officer had theretofore been entitled to, and the whole of his salary might be thereby recast. In such case the basis of the terms on which the

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employment was to continue was a contract between the interested parties, and the Local Government Board in giving its approval would, I think, be discharging a purely ministerial function. But in carrying out the duty imposed by the earlier part of the provision it would be engaged in the compulsory adjustment of right between two parties having conflicting interests—a duty which seems to me to be essentially judicial. It is important to note the extent and limits of the authority thus conferred on the Board. The sub-section relates to every "existing officer transferred," but the Board is given no jurisdiction to decide whether a particular officer comes within this description; and if it were to declare by sealed order that an officer who is not within the provision is to receive an increase of remuneration, such order, in my opinion, would be void.

Assuming, however, that the officer has the prescribed status, the Board is given uncontrolled power to determine whether his duties are increased or diminished. For this purpose it is to ascertain what were the duties performed by him before the Act, to estimate the extent to which these duties will be added to or reduced, and to put a money value on the consequential burden or relief which will thus accrue to him. The mode in which this money value is to be arrived at is not quite clear. The words of the Act are "such increase or diminution of remuneration in proportion to the increase or diminution of his duties as the Local Government Board may determine." This may merely mean that the Board is to fix the sum which, having regard to all the circumstances, they may decide to be the proper value of the added or subtracted duties, keeping a due proportion between the money and the work, or it may mean that the remuneration is to be increased or diminished in the same proportion as the duties are increased or diminished. The difference between the two constructions will be better illustrated by an example.

I take an officer whose annual salary before the statute was £400, and whose work will be increased by one-fourth in consequence of the new legislation. According to the last-mentioned view, the addition to his yearly pay would be £100; according to the first, it would be such sum as the Board considers to be a proper recompense for the performance of the increased duties, irrespective of

the rate at which his former services had been remunerated. As between these two constructions, my own mind leans to the proportionate increase or diminution. The other would seem to me to ignore, or at least to place an unnatural interpretation upon, the words "in proportion"; but it is not necessary for me to decide this, and, indeed, I am not sure that under any circumstances it would be part of my duty to decide in favour of the one or other.

It is at least a possible view that, just as the statute gives the Board jurisdiction to ascertain as a matter of fact the extent of the increase or diminution of the officer's duties, so, too, it may have conferred jurisdiction on the same tribunal to determine as matter of law the meaning of the words which regulate the sum to be added to or subtracted from his old remuneration by reason of such increase or diminution.

It is possible that, as long as the Board confines itself to fixing the amount to be so added or subtracted, its determination may be conclusive and not subject to review by any other authority; but I am clear that beyond this the Board cannot go. No power is given it to recast salaries as a whole. The old work must continue to be remunerated by the old pay. Although the Board may be satisfied that a transferred officer has heretofore been grossly overpaid or underpaid for his services, it can apply no remedy; and if it were to attempt to do so, it would be assuming a jurisdiction which it does not possess, and which I think Parliament deliberately and presumably for wise reasons withheld from it.

Having said this much about the nature and extent of the authority conferred on the Local Government Board by the subsection under consideration, I have only to add a few words as to the manner in which the authority is to be exercised.

The Board is primarily a department of Government, and not a court of justice. It is, therefore, without a *lex fori* to regulate its procedure in cases where it is entrusted with judicial functions, and the statute is silent on the subject. Under these circumstances, I am of opinion that in arriving at a determination it is under no obligation to follow the rules and observe the forms which are necessary in the case of a regularly constituted legal tribunal. No doubt, it has been given the power to hold an inquiry where

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evidence can be taken in the presence of the parties interested and arguments offered on their behalf. But this mode of procedure is not compulsory; and the Board may carry out the investigation in whatever way it considers most convenient, provided that it gives each party an opportunity of being heard.

In the case of the Wexford officers, the first step taken by the Board was a letter of the 29th August, 1899, calling the attention of the County Council to the provisions of the statute, and inviting information and observations.

No reply was given to this communication; but Mr. Webster, the county surveyor, and Mr. Leary, one of the assistant surveyors, having applied to the Council for an increase of salary, it was resolved, after careful consideration, and a report from the Finance Committee, that the old remuneration should be continued. The officers, not being satisfied with this determination, brought the matter to the notice of the Local Government Board, forwarding at the same time a memorandum and petition, setting forth the grounds on which they rested their claim. The Board thereupon proceeded to perform the duty imposed by the statute; and by letters, dated the 7th and 23rd February, respectively, informed the County Council of the conclusion arrived at in respect of the salaries.

Up to this point I think no serious objection can be taken to the procedure of the Local Government Board.

Mr. Healy has criticised the letter of August on the ground that the Board ought not to have taken the initiative; but as I read the sub-section it was its duty to see that the provision was put in force irrespective of any application from the transferred officer or local authority. It might have been more prudent if, before considering the memorandum and petition, the Board had called the attention of the Council to these documents and invited their comments thereon; but if the letters of February were, as I should have read them myself, and as the County Council regarded them, not a final determination of the matter, but a tentative statement of what was in contemplation, no harm could have resulted.

On the receipt of these letters, the Council took a judicious course. It forwarded a statement of the reasons against the increase of salary, which, whether they were bad or good, were

at least worthy of consideration. The reply to this document has caused me much surprise; and I feel myself bound to say that if it correctly reflects the spirit in which the Local Government Board has undertaken the important duties imposed upon it by the Act, no one can wonder if the result be friction and unpleasantness with the local authorities. Its purport is that if the arguments put forward by the Council in support of their protest against the increased salary of the county surveyor and his assistants had been furnished to the Board in the previous autumn, when the views of the Council were invited upon the claims of the officers, it would have weighed very carefully the Council's opinion before deciding upon the increased salaries to be allowed, but that as the Council did not intervene, either by supplying any statement of its views, or by coming to an agreement with the officers, the Board had only to fulfil the obligations imposed by the sub-section.

This must mean, if it has any meaning, that arguments relating to the performance of a public duty involving the rights and liabilities of officers and ratepayers, submitted by one of the interested parties which would or at least might have deserved to be weighed very carefully, were to be wholly disregarded because they had not been submitted at an earlier period.

When it is remembered that the only notice of any kind given to the Council was the letter of August, received at a time when the newly constituted bodies had only begun to learn their duties, that the Board had never informed the Council of the memorandum and petition of the officers, and that the inquiry consequent thereon was conducted behind the backs of the parties interested—above all, when it is remembered that it was not till two months later that the sealed orders were issued, and that, therefore, the matter was still *sub judice*, the April letter must be regarded as a very curious contribution to official literature.

But although the methods of the Board are open to criticism, it does not follow that in adopting them it exceeded its jurisdiction.

A judge or arbitrator, in the conduct of an inquiry, may act unreasonably and arrogantly, yet it may be impossible to impeach his judgment or award; and having regard to the opinion I have already expressed that the Board has the widest discretion in

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regulating its procedure, I am not prepared to hold that its sealed orders were made without jurisdiction merely because it declined to consider the reasons put forward by the County Council on the ground that they were received too late.

There remains, however, the fundamental and essential question —did the Board adjudicate upon what it was authorized by the statute to determine, or is its order the record of something wholly different—the determination of a matter upon which it had no jurisdiction to enter? I rest this branch of my judgment on the official communications emanating from the Local Government Board. I gather from what was said in the Divisional Court that some of the Judges thought that there were discrepancies between the letters written by the Secretary and the affidavits of the Vice-President. I am glad to see that the Lord Chief Baron is satisfied that no such inconsistency exists; but I have not thought it necessary to subject the documents to a critical examination with a view to forming an opinion on the subject. My reason is that I hold the Board bound by its official communications. In adjudicating upon civil rights a Judge is often obliged to choose between a statement in writing made in good faith before litigation and the evidence of the writer given in the witness box. In such a case he has no hesitation in selecting the former. It is of still greater importance to apply the same rule to the utterances of public departments. We have here letters deliberately written by the official whose duty it is to make known the views and decisions of the Board; and I cannot hesitate to accept and act upon what is contained therein.

I take first the letter of the 23rd February relating to the salaries of assistant surveyors. The petition of these officers made the principal foundation of their claim the fact that they had been hitherto notoriously under-paid.

The letter points out that the length of roads in their districts varies from 200 to 500 miles, and that the Board had come to the conclusion that the mileage should be taken into consideration in determining the salary of these officers, but that no salary should be less than £120.

The Board had accordingly decided that the salaries of all existing assistant surveyors should be increased, and should be

fixed according to a scale set forth, which makes the salary dependent entirely on the mileage. It would be difficult to conceive a statement showing more clearly that the Board had recast and revised the old salaries, and that the increased remuneration was not given in respect of the increased work, but that the officer was to be paid for all his duties, old as well as new, according to the scale then promulgated.

I am far from thinking that if the Board had jurisdiction to do this the conclusion arrived at was not just and reasonable, but it exceeded its authority. The sealed orders embodying its determination are, I think, unobjectionable in form. The rule that the inferior Court ought to show on the face of its orders the circumstances that give it jurisdiction only applies in the case of Courts properly so called, and it is enough if the orders of the Local Government Board set forth the provision of the statute under which it purports to act But the defect is one not of form but of substance, and, for the reasons I have indicated, I am of opinion that the order in *Leary's Case* is wholly void.

The letter of the 7th February, relating to the salaries of county surveyors, is more ambiguous. It states that the Board had come to the conclusion that a fixed addition of salary, uniform in each class, should be given to cover the additional work, and that the mileage of roads in each county should be a factor in determining the amount of the increased salary, which the surveyors would be entitled to in order to recoup them for the additional travelling expenses.

These words, unlike the language used in reference to the assistant surveyors, seem to indicate that the Board in the case of the superior officers had confined itself to the duty prescribed by the statute. But the letter concludes by saying that "the salary to be paid to the county surveyor of Wexford, including the additional remuneration for his increased duties, is accordingly fixed at £800 per annum"; and in a letter of the 27th June Mr. Webster's salary is described as the salary "due to him according to the scale determined by the Board on the 24th January, 1900."

Still, if I were to decide the matter upon these documents alone, I should not hold that in the case of Mr. Webster the

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Board had exceeded its jurisdiction. I am, however, obliged to read the letter of the 7th February in connexion with that of the 23rd, which satisfies me, as I have already said, that the Board laid down an entirely new scale of remuneration for the assistant surveyors irrespective of what their old salaries had been. I need hardly say that I acquit the Local Government Board of any conscious usurpation of jurisdiction in so doing. It honestly, though erroneously, believed that this was the duty imposed on it by Parliament, and it seems to me that I ought to assume that it acted on the same principle in the case of other officers. I therefore hold that the sealed order relating to Mr. Webster's remuneration is also void. Whether in these circumstances they can be quashed by means of the writ of *certiorari* is a question of much difficulty, as to which my mind was long in doubt; but, after anxious consideration, I have arrived at the same conclusion as the Lord Chief Baron, and, having had an opportunity of reading his judgment, I feel that I could not profitably add anything to it on this branch of the case.

I agree with him that there is nothing either in the original construction of the Local Government Board or in the Act of 1898 that renders the writ of *certiorari* inapplicable to its orders when the order is the record of a judicial determination. I agree with him also in holding that many of its functions are purely ministerial, and, therefore, outside the province of the writ, and that even where it is entrusted with duties of a judicial character, the discretion conferred is often so wide and absolute as to leave no place for the interference of any other authority.

But I further hold, as he does, that there are cases—of which this is one—where the limits of the jurisdiction of the Board in judicial matters are defined by the statute that confers it; and where, if those limits are transgressed, the writ of *certiorari* supplies a remedy. I, therefore, concur in the judgment of the Court allow the appeals.

Solicitor for the County Council: *Elgee.*
Solicitor for Mr. Webster: *Thornton.*
Solicitors for the Local Government Board: *T. T. Mecredy & Son.*

G. Y. D.

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Andrews, J.
1901.
March 15.
June 3.

Fee-farm grant—Costs of approval and execution by grantor—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order*, 16*th April*, 1884, *Rule* 2 (*c*).

The solicitor of a grantor in a fee-farm grant made under the Renewable Leasehold Conversion Act is entitled to have his costs, in respect of the approval and execution of the grant, taxed as provided by Rule 2 (*c*) and Schedule II. of the General Order of the 16th April, 1884, made in pursuance of the Solicitors' Remuneration Act, 1881, and is not limited to an approval fee of two guineas.

APPEAL by the defendant from a decision of the County Court Judge of Armagh. Judgment on the appeal was reserved and delivered in Dublin.

The civil bill was brought by Mrs. Lowry, the grantor in a fee-farm grant made in pursuance of the Renewable Leasehold Conversion Act, and Mr. Mullan, her solicitor, to recover from the defendant, the grantee in the grant, a sum of £3 13*s.* 2*d.*, the balance of a bill of costs in respect of the approval and execution by the grantor of the said grant. The grant and the counterpart were prepared by the defendant's solicitor, and sent by him, with an approval fee of two guineas, to the plaintiff Mullan. The latter contended that the grantor's costs were not limited to such approval fee, and he furnished the defendant's solicitor with a bill of costs comprising the following items:—

	£	*s.*	*d.*
Received letter from you enclosing draft grant for approval.			
1. Instructions to enable me to approve thereof, including perusal of original lease, and attendance on the grantor and grantee discussing and arranging terms, ...	0	13	4
2. Perusing draft, 26 folios, ...	1	6	0
3. Letter to you with draft approved, ...	0	3	4

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		£	s.	d.
	Received letter from you to reinstate the words as to deductions for poor-rate struck out.			
4.	Letter in reply, and that I had followed the words in the original lease, which was the usual course, .	0	3	4
	Letter to you requesting you to send me engrossment of grant for execution, as my client was leaving home.			
	Received letter from you enclosing one part of grant and memorial for execution, and draft for comparison.			
5.	Letter to you returning grant and requesting you to have a duplicate engrossed and executed by your client, ...	0	3	4
	Received letter from you enclosing grant and duplicate unexecuted.			
6.	Comparing engrossments of grant and memorial with draft, 4 skins, ...	0	10	0
7.	Letter to you returning grant for execution by your client, ...	0	3	4
	Received same executed.			
8.	Letter to Mrs. Lowry enclosing grant and memorial, and giving directions for the completion thereof, .	0	3	4
9.	Attendance of my Dublin agents, reading over and explaining grant, and witnessing her execution of same, and to make affidavit of execution, . .	0	13	4
10.	Paid Commissioner's fee, ...	0	1	6
11.	Paid stamps on grant and counterpart, . . .	0	15	0
12.	Paid memorial and registry fees, ...	0	13	6
13.	Letter to you stating the grant had been completed and enclosing note of my fees, ...	0	3	4
14.	Postages, parcels, &c., ...	0	2	6

Credit was given for the two guineas sent as approval fee, and the balance, £3 13*s.* 2*d.*, was the amount now sued for.

The defendant admitted liability in respect of the disbursements forming items 10, 11, and 12, and tendered the amount thereof before action.

Cusack, for the plaintiffs.

Dromgoole, for the defendant.

ANDREWS, J. :—

This was an appeal, which was heard before me at the last Spring Assizes for the county of Armagh, against a decree made by his Honour the County Court Judge, dated the 19th January, 1901, for £3 13*s.* 2*d.* debt and 13*s.* costs, in a civil bill action brought by the plaintiff Mrs. Lowry (who was the grantor in a fee-farm grant under the Renewable Leasehold Conversion Act), and the plaintiff, Mr. Mullan (her solicitor), against the defendant, Mr. Brooks (who was the grantee in the fee-farm grant), to recover the sum of £3 13*s.* 2*d.* as the balance of Mr. Mullan's bill of costs, furnished at £5 15*s.* 2*d.*, in respect of the approval and execution by Mrs. Lowry of the grant in question, after crediting the paid approval fee of £2 2*s.*

The disbursements in the bill of costs, amounting to £1 10*s.* (viz. 1*s.* 6*d.*, 15*s.*, and 13*s.* 6*d.*) and forming part of the £3 13*s.* 2*d.* sued for, were admitted by the defendant and tendered before action. The question argued before me was whether the plaintiffs were entitled to a decree for any, and if so what, amount over and above the £2 2*s.* and the £1 10*s.* I refer to the bill of costs.

The grantee's solicitor prepared both the grant and counterpart, and sent them for approval with a fee of £2 2*s.*

Prior to the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), a practice which had existed for a great length of time was prevalent, according to which a fee of £2 2*s.*, called an approval fee, was in ordinary cases paid to, and accepted by, the lessor or grantor to cover the expenses he might reasonably incur in relation to his approval and execution of a lease or fee-farm grant. A like fee was also very generally paid and accepted to cover the like expenses in cases of other ordinary deeds. This approval fee of £2 2*s.* is not to be found in any authorized schedule of costs, nor is it prescribed by any cost rule. Its payment and acceptance rested on its being a recognised customary fee in ordinary cases, and its amount was probably originally arrived at as being sufficient to cover a solicitor's reasonable and legitimate charges for the instructions, perusals, and attendances incident to obtaining the lessor's, grantor's, or transferor's approval and execution of the deed. In cases, however, in which £2 2*s.* would be inadequate to cover such charges there was no uniform practice limiting the

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approval charges to that amount. In the matter of *Hobb's Estate*, in 1858, it appears from the addenda to Mr. Adair's book on the Law of Costs that Judge Longfield ordered a payment of £4, in addition to an approval fee of £2 2*s*., to the solicitor for the landlord, who was the grantor in a fee-farm grant, regarding £2 2*s*. as inadequate under the circumstances, although the same learned Judge (as would appear from what is stated by Mr. Adair, at pages 136 and 137 of the same book) seems to have regarded £2 2*s*. as the proper fee in ordinary cases. Mr. Edge in his book upon Leases (2nd Ed. p. 212) refers to the approval fee of £2 2*s*. in an ordinary case, and to the disallowance by Smith, M.R,, in 1865 in an unreported case of *M'Neillys, Minors*, of a claim by the grantor in a fee-farm grant under the Renewable Leasehold Conversion Act for costs over and above the £2 2*s*. approval fee.

It is provided by the 1st section of the Renewable Leasehold Conversion Act (12 & 13 Vict. c. 105) that the expense of the preparation and execution of the grant thereunder and the counterpart shall be paid by the owner to whom the grant is made, and Mr. Edge (p. 212) regards it as being generally believed that these words (so far as the grantor is concerned) include only an approval fee in an ordinary case of £2 2*s*., and he thinks this view was probably adopted in accordance with the disallowance by the Master of the Rolls of a claim for more, viz. the case of *M'Neillys, Minors*. The same view is expressed by Mr. Mecredy in his book upon the Law of Fee-Farm Grants, at page 54. I may also refer to the case of *Meylers, Minors* (1), in which the approval fee was referred to as "the customary fee of two guineas," and the question of the right of the landlord's solicitor to more was considered in connexion with a sub-grant under the Church Temporalities Acts.

If nothing had occurred to affect this customary practice as regards the £2 2*s*. approval fee and the judicial recognition of it, I would not have felt at liberty to allow more in the present case, which is an ordinary one, nor to have construed the words I have referred to in the 1st section of the Renewable Leasehold Conversion Act as intended to alter what at that time was the generally

(1) I. R. 8 Eq. 465.

accepted practice; but I now come to consider the effect of the Solicitors' Remuneration Act, 1881.

This Act, as its title shows, was passed "for making better provision respecting the remuneration of solicitors in conveyancing and other non-contentious business." The 2nd section empowered the Lord Chancellor and others therein mentioned from time to time to make any such general orders as to them seemed fit for prescribing and regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other non-contentious business. The General Order dated the 16th April, 1884, made in pursuance of the power so conferred, provided that after the 1st June, 1884 (subject to an exception respecting real property with a recorded title), the remuneration of a solicitor in respect of the non-contentious business dealt with by the Act should be, (*a*) in respect of sales, purchases, and mortgages completed, for the solicitor having the conduct of the business the remuneration prescribed in Part 1 of Schedule I. to the Order; (*b*) in respect of completed leases and agreements for leases, or conveyances reserving rent, or agreement for the same, for the solicitor having the conduct of the business the remuneration prescribed in Part 2 of Schedule I. to the Order; (*c*) in respect of (in effect) all other business to which the Act applied, the remuneration for which was not thereinbefore or in Schedule I. prescribed, the remuneration was to be regulated according to the then present system as altered by Schedule II. thereto.

Schedule I., Parts 1 and 2, prescribe scale charges for the business therein respectively referred to, which include, as a reference to them will show, what the former approval fee covered. These scale charges are not applicable to the present case, which is not within Schedule I., Part 1., and fee-farm grants under the Renewable Leasehold Conversion Act are expressly excluded from the scale charges apparently, which would otherwise be applicable to them under Schedule I., Part 2. I think this General Order must be regarded as having made provision for all the business to which the Act applies, which includes the business the remuneration for which is under consideration in the present case, and, in my opinion, therefore, the defendant's liability is not determined

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by the amount of the approval fee of £2 2*s.*; and the remuneration in question is to be regulated in accordance with the system which was in existence at the date of the General Order as altered by Schedule II.; and the bill of costs in question ought to be taxed accordingly. I think the combined effect of the Act and General Order is that the heretofore recognised practice as regards the £2 2*s.* approval fee cannot now be insisted on, and may be rejected by anyone interested therein who prefers to have the remuneration it was intended to cover regulated in accordance with the Act and General Order. In cases within the scale charges of Schedule I., Parts 1 and 2, this remuneration is obviously included in the remuneration therein provided for; and in cases not within Schedule I. the solicitor entitled to the remuneration formerly intended to be covered by the approval fee may, in my opinion, furnish, or be required to furnish, his bill of costs, and have it taxed in accordance with the system in existence in 1884 as altered by Schedule II.

In order to determine the proper amount of the bill in question so taxed, I have availed myself of the valuable assistance of the experienced senior Taxing Master, who concurs in the opinion I have expressed as regards the £2 2*s.* approval fee, and I reduce the charge of 13*s.* 4*d.* in item 1 by 3*s.* 4*d.*; I disallow the charge of 10*s.* in item 6; I reduce the charge of 13. 4*d.* in item 9 by 3*s.* 4*d.*; and I reduce the charge of 2*s.* 6*d.* in item 14 by 1*s.* 6*d.*

These deductions amount to 18*s.* 2*d.*, and bring the bill from £5 15*s.* 2*d.* down to £4 17*s.* (which exceeds by £1 5*s.* the £2 2*s.* approval fee and the £1 10*s.* of admitted disbursements), against which is to be credited the £2 2*s.* approval fee which was paid. This leaves the sum of £2 15*s.* due to the plaintiffs, to whom I shall therefore give a decree for £2 15*s.*, with their costs below and of appeal; and I shall direct the money lodged in Court to be paid out to the plaintiffs towards satisfaction of the total amount of their debt and costs which will be specified in my decree.

Solicitor for the plaintiffs: *R. A. Mullan.*
Solicitors for the defendant: *Corr & O'Connor.*

J. G. T.

RITCHIE *v.* MALCOLM (1).

K. B. Div. Probate. 1902. Jan. 20.

Probate—Practice—Will—Proof in solemn form—Citation to see proceedings — Compromise — Res inter alios acta — *Cognizance of proceedings and power to intervene—Estoppel.*

A person, although cited to see proceedings, is not estopped by judgment therein as the result of a compromise, to which he was not a party, and of which he knew nothing; and he is not estopped from questioning the validity of a will proved in solemn form as the result of such verdict and compromise.

By his will, dated 16th November, 1900, James Ritchie, of Belfast, who died on the 10th February, 1901, bequeathed his property to trustees for the purpose of establishing and maintaining a school, and appointed John Malcolm and the Reverend James Hunter his executors. The executors instituted an action to obtain probate of the will in solemn form, naming as defendants therein three of the next-of-kin of the testator. The plaintiffs caused a citation in the action to be issued giving notice to Robert Ritchie (residing in Scotland), as one of the next-of-kin of the deceased, to appear in the said action either personally or by his solicitor, and the citation was served on him on 20th April, 1901, but no appearance was entered for him in the action. Three other next-of-kin were also cited to see proceedings. The defendants pleaded, (1) undue execution of the will; (2) want of testamentary capacity in the testator; (3) want of knowledge and approval by him of the contents of the will; and (4) that the will was obtained by the undue influence of the Rev. James Hunter, one of the plaintiffs in that action. The action came on for trial at the Summer Assizes in Belfast on 1st August, 1901, before Palles, C.B., and a special jury, and during the progress of the plaintiffs' case, and before the case of the defendants had been opened, a consent was entered into between the parties which provided that

(1) Before ANDREWS, J.

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the plaintiffs should pay to the three defendants within two months the sum of £500, the defendants agreeing to withdraw all opposition to the proof of the will, and to give up all claims on the assets of the deceased which they were to assign to the plaintiffs. The defendants were also to be paid £150 for costs out of the assets, all pleas to be withdrawn by them.

In accordance with the consent the jury found that the will was properly executed; that the testator knew and approved of the contents thereof; and that he was of sound mind, memory, and understanding at the date of the execution thereof. By consent the question of undue influence was withdrawn, and judgment was given establishing the will on 2nd August, 1901. The costs of the plaintiffs and of the defendants were ordered to be paid out of the estate, Palles, C.B., stating in his order "that he was of opinion that the peculiarities under which the said will was executed entitled the defendants to have the said will established at the expense of the estate."

On 22nd October Robert Ritchie commenced an action for revocation of probate on the same grounds as those on which the will had been impeached in the first action. The executors of the testator (the plaintiffs in the first action) were named as defendants in this action.

In the 13th paragraph of their defence the defendants pleaded that the plaintiff was bound by the proceedings and judgment in the former action, and that by reason of such proceedings and judgment he was estopped from taking proceedings to have probate of the will revoked, and that the action was unnecessary and improper, and ought to be dismissed with costs. The plaintiff in his reply pleaded that the verdict and judgment in the first action was obtained as the result of a compromise between the parties to that action by which money was paid to each of the defendants in that action, and that the present plaintiff was no party to the said compromise, and had no knowledge thereof.

The case came before Andrews, J., on a summons to fix the time and mode of trial; and the Judge ruled that the defence and the reply in the second action raised preliminary questions which ought to be determined before the action should be sent for trial. A notice of motion was accordingly served to have these

questions set down for hearing and disposed of before the trial. When the motion came on for hearing it was agreed that the questions should be deemed to be then set down and determined on the hearing of the motion.

An affidavit was filed by the plaintiff, Robert Ritchie, which stated that he was not aware of the compromise, nor represented by anyone at the first trial, and that since that trial he had discovered further evidence showing that the deceased, James Ritchie, at the time of the execution of the will was incapable of understanding it.

Gordon, K.C. (with him *Harrison, K.C.*, and *M'Ilroy*), for the defendants:—

On the evidence the jury found in favour of the will, the plea of undue influence having been withdrawn as unsustainable. Robert Ritchie, as a person cited to see the proceedings, is bound by the result, even though he was no party to and had no knowledge of the compromise. There was really nothing equivalent to a compromise entered into on the trial of the first action. At any rate there was no fraud or collusion. A cited party is a privy to the suit; he is amenable to the order of the Court: *King* v. *Gillard* (1). There is no case where a person duly cited to see proceedings has been allowed to come in and litigate the same matter over again unless there be something in the nature of fraud. *Sanders* v. *Wigston* (2) shows what is the position of a cited party, and the effect of citation is illustrated by *Davis* v. *Davis* (3); and see Maxwell's Probate Practice, p. 259. The case of *Wytcherley* v. *Andrews* (4) turned altogether on the question of notice, and no decision was in fact come to on the question now being argued. *Young* v. *Holloway* (5) was not a case of citation; and in *Davidson* v. *Woods* (6), where next-of-kin were held not to be bound by a compromise though cognizant of the proceedings, these cases were not cited; see also *Moran* v. *Moran* (7). In every case where a person, who was aware of the existence of a probate

(1) 1 P. & D. 539.
(2) 1 Rob. 460.
(3) 4 Sw. & Tr. 208.
(4) 2 P. & D. 327.
(5) [1895] P. 87.
(6) 7 Ir. Jur. (N. S.) 307.
(7) I. R. 8 Eq. 303.

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action, has been held not to be bound by a compromise entered into without fraud and without his knowledge, that person has not been cited.

The Right Hon. The Macdermot, K.C., and *Williamson*, for the plaintiff, Robert Ritchie:—

The result of the first proceedings as regards us was the same as if the compromise had been fraudulent. It was an arrangement of which we had no knowledge, and for the purpose of obtaining which we were not cited. A cited party is not bound by a compromise to which he is not privy. The verdict obtained in the first action was a compromise between the parties to it as a matter of bargain and sale.

The position of parties cited to see proceedings is the same as if they knew of the proceedings but did not intervene, with the exception that in the former case their knowledge is proved by the record; in the latter it is a matter of evidence; and persons who knew of proceedings and did not intervene are not bound by a compromise: *Ratcliffe* v. *Barnes* (1); *Newell* v. *Weeks* (2); *Wytcherley* v. *Andrews* (3). *Davidson* v. *Woods* (4) is an authority that parties who knew of a suit and could have intervened are not bound by a compromise. At page 308 of the report Keatinge, J., says:—"Can I in this case attach greater value to a verdict had on a compromise, by which all opposition was withdrawn in consideration of £5000 additional paid to the widow and £1500 to an alleged heir-at-law, than I would to a probate granted in common form by the Registrar? I am of opinion that I cannot, and no authority has been referred to to the contrary."

And see Tristram and Coote's Probate Practice (13th Edition), p. 355.

Harrison, K.C., in reply:—

A compromise only binds the parties to it except in the case of a person cited to see the proceedings; then the case is different. The reason for this distinction is that the citation is a

(1) 2 Sw. & Tr. 486.
(2) 2 Phill. 224.
(3) 2 P. & D. 327.
(4) 7 Ir. Jur. (N. S.) 307.

formal document, a document of record (there can be a certificate that no appearance has been entered), and the service of such document places the person on whom it is served in a position analogous to a person served with a writ, or against whom interlocutory judgment has been marked. A person cited can make himself a party to the proceedings. The person who serves it on him cannot deny his interest. He is a party or a possible party to the proceedings; it is his own fault if he is not represented at the trial. At what point does he cease to be bound? Could a verdict establishing a will by consent be set aside because the executor propounding it paid a sum of money to the person contesting the will, not as of right but to buy off his opposition, and to ensure that the proceedings came to an end? There are many cases where a jury, though satisfied that the testator had all his faculties when he made his will, does not like the relations to lose everything, and, consequently, are disinclined to find in favour of due execution.

We submit that, under the circumstances, Robert Ritchie is bound by the result of the first trial.

ANDREWS, J.:—

James Ritchie by his will, dated the 16th November, 1900, left all his property to an Education Board named in his will, for the purpose of establishing and maintaining a school, and appointed John Malcolm and the Rev. James Hunter his executors. The executors instituted an action to obtain probate of the will in solemn form, and made three of the testator's next-of-kin defendants.

The plaintiffs caused four others of the next-of-kin, including Robert Ritchie, who resided in Scotland, to be served with a citation to see proceedings.

The defendants pleaded, (1) undue execution of the will; (2) want of testamentary capacity in the testator; (3) want of knowledge and approval by him of the contents of the will; and (4) undue influence.

The action came on for trial at Belfast at the last Summer Assizes, and during the progress of the plaintiffs' case, and before the defendants' case had been opened, a consent, dated the 2nd

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August last, was entered into between the parties, which provided that the plaintiffs should pay to the defendants £500 within two months, they giving up to the plaintiffs all their claims on the assets of the deceased which they were to assign to the plaintiffs; that the defendants' costs, measured at £150, should be paid out of the assets; and that all the pleas should be withdrawn, including the plea of undue influence.

Evidence was given on which findings of the jury were then taken in favour of the will on the 1st, 2nd, and 3rd pleas, which findings were necessary in order to found a judgment establishing the will. The question of undue influence was withdrawn, and no finding was obtained upon it. It was ordered by the Court that the consent should be received and entered in the principal Probate Registry; and on the same day, the 2nd August last, judgment was given establishing the will, and the plaintiffs and the defendants were given their costs of the action out of the personal estate of the deceased, the Judge stating in his order that "he was of opinion that the peculiarities under which the said will was executed entitled the defendants to have the said will established at the expense of the estate." The consent was afterwards carried out by a deed between the parties dated the 4th October, 1901, one of the clauses in which contemplated that the probate, which issued on the 28th September last, in pursuance of the said judgment, might possibly be revoked, and the will condemned.

Robert Ritchie, one of the cited next-of-kin, by his affidavit sworn the 19th December, 1901, states (paragraph 4) that he was not present nor represented by anyone at the trial, and that he knew nothing of what occurred at it or of the settlement, and that at the time of the trial he was residing in Scotland; and (paragraph 5) that since the compromise he has discovered a large volume of evidence that the deceased, James Ritchie, was not at the time he executed the will capable of understanding it. The statements in the 4th paragraph of this affidavit have not been controverted. On the 22nd October last Robert Ritchie instituted the present action against the executors to have the probate of the will revoked, and to have the will condemned on the same grounds as had been relied on in the first action.

The executors in the 9th, 10th, 11th, and 12th paragraphs of their defence set out and relied on the service on Robert Ritchie of the citation to see proceedings in the first action and the findings and judgment in that action, and claimed in the 13th paragraph of their defence that the plaintiff, Robert Ritchie, was bound thereby, and that his action should be dismissed. In his reply (paragraph 3) the plaintiff relied on the compromise to which he was not a party and of which he had no knowledge.

When the case came before me, on a summons to fix the time and mode of trial, I ruled that the 9th and subsequent paragraphs of the defence and the 3rd paragraph of the reply in the second action raised preliminary questions which ought to be determined before the action should be sent to trial. This was not dissented from, and, accordingly, the executors served a notice of motion to have these questions set down for hearing and disposed of before the trial. When this motion came on for hearing counsel on both sides agreed that these questions were to be deemed to be then set down, and should be determined on the hearing of the motion, which was heard accordingly. The substantial contention on behalf of the executors was that, owing to the citation to see proceedings, Robert Ritchie, the plaintiff in the second action, was bound by the result of the first action, even though he was no party to and had no knowledge of the compromise; and it was said that none of the cases in which a person who was aware of the existence of a probate action but was held not bound by the result when arrived at by a compromise of which he had no knowledge, were cases in which there had been a citation to see proceedings.

In my opinion the principle to be applied is the same whether the person who is sought to be bound by the result of the first action has been cited to see proceedings or not. This citation fixes the person cited with knowledge of the existence of the action. Where there has been no citation such knowledge must be otherwise proved; but no case has been referred to, and I am aware of no case which decides, or even countenances, so far-reaching, and, as I think, so startling a proposition as this, that although a person cited is not bound to appear, and is cited, as I hold he is, to see a trial, and not some possible compromise, of which he has no

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knowledge, between the parties to the action, he is, nevertheless, bound by the result of the trial, though brought about by a compromise to which he was no party, and of which he knew nothing.

In my opinion if the action does not proceed to its natural end, but terminates by reason of a compromise entered into without his knowledge, he is not bound by the result. The rule to be extracted from the judgment of Lord Penzance in *Wytcherley* v. *Andrews* (1) is, in my opinion, applicable whether the person to whom it is sought to be applied has been cited to see proceedings or not. That rule is well stated in Tristram & Coote's Probate Practice, 13th Ed., p. 355, thus:—"It is not necessary in the Probate Court that a person should be a party to a suit in order that he should be bound by its result; it is sufficient that he be privy to the proceeding. If a person is privy to a suit, and, knowing what is passing, is content to stand by and see his battle fought by somebody else in the same interest, and it appears that everything has been done *bona fide* in his interest, he is bound by the result and not allowed to re-open the case. But if the suit terminates in a compromise, entered into without notice to him and without his having knowledge that the suit is not proceeding to its natural end, he is not bound by the agreement which the parties to the suit choose to enter into. A bargain only binds those by whom it is made. Persons who are willing to stand by while a contest is going on are bound by the decision of the Court, but they are not compelled to abide by a compromise when no decision is in fact come to by the Court."

Now, consider what was done at the hearing of the first action. The defendants in it came down to trial prepared to rely on each of the defences I have referred to, but their case was not even opened, nor was any part of their evidence heard. I cannot assume in the face of the compromise which was entered into that there was no real controversy between the parties, or that there was no question of substance affecting the validity of the will to be tried. The executors gave the defendants £500 out of assets, sworn under £2890, and left by the will to a charity, and assented to the

(1) L. R. 2 P. & D. 327.

defendants being paid out of the assets a further sum of £150 for their costs. The defendants having thus secured a large sum for themselves, withdrew all opposition and allowed the will to be proved. I think it may well be said *res ipsa loquitur*, and that their opposition was in fact bought off. As soon as the compromise was entered into there ceased to be a legitimate *contradictor* in the case. Further, can it be possibly suggested that not only *everything* but even *anything* was done *bona fide* in Robert Ritchie's interest? The defendants having secured £500 for themselves allowed him to be shut out—not by a decision arrived at after the evidence had been heard on both sides and the action had proceeded to its natural end—but by assenting to the will being proved without opposition, in a case in which the executors felt themselves justified in paying out of what was left to the charity the sum of £500 to get rid of an opposition, which I cannot assume was not a real and substantial one, by which the will was imperilled.

I shall therefore declare that, notwithstanding the allegations in paragraphs 9 to 13, both inclusive, of the executors' defence in this action, the plaintiff, Robert Ritchie, is not bound by the result of the action between John Malcolm and the Rev. James Hunter, plaintiffs, and Alexander Ritchie, George Ritchie, and Agnes Craig, defendants: and I shall order that the said Robert Ritchie be at liberty to proceed with this action, and that the questions raised by the said paragraphs in the defence and paragraph 3 of the reply are to be taken as now determined in favour of Robert Ritchie and are not to be re-agitated in this action, and that the defendants in this action do pay to the plaintiff, Robert Ritchie, his costs of this motion when taxed and ascertained, without prejudice to any application the executors may be advised to make hereafter with reference to those costs and their own costs of this motion.

Solicitor for the plaintiff, Robert Ritchie: *John M'Kee.*
Solicitors for the executors of James Ritchie: *C. & J. Black.*

R. W. L.

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Nov. 28, 30. Dec. 1, 5.

REG. (LOCAL GOVERNMENT BOARD FOR IRELAND) *v.* GUARDIANS OF NORTH DUBLIN UNION AND DR. JOSEPH CULLEN (1).

Local Government Board—Dispensary district—Medical officer—Resignation—Effect of tendered resignation unaccepted—Effect of reappointment of same medical officer as locum tenens*—Mandamus.*

Dr. J. Cullen, the medical officer of a dispensary district in the respondents' union, upon threat of removal by the Local Government Board, tendered his resignation to the guardians. The guardians did not definitely accept, or refuse to accept, his resignation, but shortly thereafter, by resolution, they appointed him as *locum tenens*, pending a report by a special committee into the matters alleged by the Local Government Board, "as otherwise the district would be left without a medical officer." The Local Government Board insisted that upon the tender of Dr. Cullen's resignation the office had become vacant, and as the guardians declined to make a new appointment, the Board now sought by mandamus to compel them to take the necessary steps to fill the vacancy:—

Held, that the office did not become vacant upon the tender of the officer's resignation, but that (the tender remaining open) the subsequent appointment of Dr Cullen as *locum tenens* involved in law an acceptance of his resignation, and that mandamus should issue.

Semble: It is not competent to such district medical officer to resign his office without the assent of the guardians, his employers.

The power of the Local Government Board to appoint a medical officer (14 & 15 Vict. c. 68, s. 8) on default of appointment by the guardians within a month, applies only where the previous officer has been removed by sealed order.

MANDAMUS.

This was an application on behalf of the Local Government Board for Ireland to make absolute, notwithstanding cause shown, a conditional order, dated the 8th August, 1900, for a writ of mandamus directed to the Guardians of the North Dublin Union, commanding them to appoint a fit, proper, and duly qualified person to fill the office of medical officer of the Blanchardstown and Castleknock dispensary district of said union.

(1) Before PALLES, C.B., and ANDREWS and BOYD, JJ.

On the 8th March, 1897, Dr. Cullen had been duly appointed medical officer of the dispensary district in question with the sanction and approval of the Local Government Board, given pursuant to 14 & 15 Vict. c. 88, s. 8, and amending Acts. He had acted (as was alleged by the Local Government Board) in that capacity until "the date of his resignation, on or about the 9th May, 1900." Dr. Cullen was also, under the Public Health (Ireland) Act, 1878, s. 11, a sanitary officer for the same district. By virtue of the Local Government Act, 1898, and the orders and regulations made thereunder the business of the sanitary authority of the district had been transferred to the North Dublin rural district council, and the business of the committee of management of the dispensary district to the respondent guardians. The Local Government Board alleged that Dr. Cullen had failed in the discharge of his duties as medical officer of health, and that they had come to the conclusion that they had no option but to require Dr. Cullen to tender his resignation as medical dispensary officer of the district and officer of health. On the 4th May the Board wrote to Dr. Cullen stating that unless his resignation was sent in in four days they would be reluctantly compelled to take the extreme step of removing him from these offices by order under seal. This course (as Dr. Cullen deposed) "left him no alternative but to tender his resignation or expose himself to the danger of being dismissed for disobedience."

On the 7th May, 1900, Dr. Cullen, in obedience to this letter, tendered his resignation to the guardians, and that body, on the 9th May, unanimously appointed a committee to inquire into the circumstances under which the Local Government Board had acted, and, pending their report, directed that Dr. Cullen be continued as medical officer of the Castleknock dispensary district. Dr. Cullen deposed that the guardians refused to accept his resignation until they had an opportunity of judging whether the evidence warranted them on calling for his resignation.

On the 15th May, the Local Government Board wrote informing the guardians that, Dr. Cullen having tendered his resignation, "the office of dispensary medical officer thereupon became vacant," and they called upon the guardians to take the requisite steps to elect a duly qualified person to fill the vacancy, and for that purpose

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they also called upon the district council to fix the amount of salary payable in respect of the office of medical officer of health (which could only be held by the dispensary district officer: Public Health (Ireland) Act, 1878, s. 11). The guardians refused to accept this view, and on the 16th May passed a resolution that, "considering that Dr. Cullen's resignation has been tendered under threat of dismissal by the Local Government Board, this board is of opinion that we are entitled to have an opportunity of inquiry into the circumstances under which that threat has been made," and asking to be furnished with a copy of the evidence taken at the inquiries. This was approved of by the Local Government Board. The guardians meanwhile had continued Dr. Cullen in his office under their resolution of 9th May.

On the 22nd May the secretary of the Local Government Board wrote to the guardians stating that, "Dr. Cullen having tendered his resignation as medical officer of the Blanchardstown and Castleknock dispensary district, the office thereupon became vacant, and the only course now open to the guardians is to take the requisite steps to elect a duly qualified person to the office as already directed. The Board at the same time think it well to observe that the guardians cannot legally pay any salary to Dr. Cullen from the date of his resignation." This letter being laid before the guardians at their meeting on the 23rd May, they adopted a resolution—"That Dr. Cullen, medical officer of the Castleknock district, be appointed by this board of guardians as *locum tenens*, pending the report on the case by the committee appointed by this board, as otherwise the district will be left without a medical officer." As to this resolution of the 23rd May, the chairman of the board of guardians and the clerk deposed that there had been no intention thereby of admitting that there was a vacancy in the post, and it was submitted by them that in any event Dr. Cullen's enforced tender of resignation had been revoked upon his consenting, pursuant to the resolution of 9th May, to continue to hold and perform the duties of the office. The Local Government Board declined to sanction or approve of this appointment, and called on the guardians to appoint a proper officer, alleging "that no formal acceptance by the guardians of the medical officer's resignation was necessary to render the act of

resignation complete and effective, and that the delivery to the guardians of such resignation thereby created a vacancy in the office of dispensary medical officer."

On the 27th June, 1900, after repeated requests by the Local Government Board, the District Council fixed the salary of the medical officer of health at £30.

On the 4th July the guardians passed a resolution that the Local Government Board be informed that Dr. Cullen's resignation was not accepted by the guardians—that he was still discharging the duties of dispensary medical officer and officer of health, and that the board had full confidence in him; and on the 25th July, 1900, they wrote to the Local Government Board, stating that they (the guardians) could come to no other conclusion than that they would be acting wrongly if they accepted Dr. Cullen's resignation. The Local Government Board having refused to recognise the appointment of Dr. Cullen as *locum tenens*, and having failed to induce the guardians to appoint an officer over whom they could have control, now applied for a mandamus, alleging that the temporary appointment of Dr. Cullen to the offices in question was illegal; that any moneys paid to Dr. Cullen for services rendered by him would be liable to be surcharged; and that it was a matter of urgency that the guardians should be compelled to take the necessary steps for the appointment of a medical officer.

J. H. Campbell, Q.C. (*Ronan, Q.C.*, and *Chambers*, with him), for the Local Government Board.

The Right Hon. C. H. Hemphill, Q.C., and *Carroll*, for the respondents.

Healy, Q.C., and *Patchell*, for Dr. Cullen.

Cur adv. vult.

Dec. 5.

The judgment of the Court was delivered by—

PALLES, C.B.:—

This is an application for a mandamus to a board of guardians to proceed to appoint a medical officer for a district in the county of Dublin. The questions material to the decision are two: (1) Is the office vacant? (2) If so, have the prosecutors another

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remedy of such a character as to prevent them being entitled to a mandamus?

The vacancy of the office, if it be vacant, was caused by resignation. There was no sealed order of dismissal; and, therefore, the question of due cause for dismissal is not open. It follows that we have no jurisdiction to inquire into the conduct of the medical officer; and for this reason we declined to hear either discussion as to, or evidence of, that conduct. I consequently assume (as in justice to Dr. Cullen, under these circumstances, I am bound to assume), that he was not guilty of any breach of duty, or other misconduct in his office.

The argument for the prosecutors, that the office is vacant, was rested on two grounds:—(1) that by reason of the nature of the office Dr. Cullen was entitled to resign of his own free will, and without the assent of the guardians; and that, consequently, his resignation was complete when his letter was received by the clerk of the guardians; (2) that the resignation was accepted, or, what is the same thing, was assented to by the guardians, and acted upon by them, by appointing Dr. Cullen himself as *locum tenens*.

Upon the question whether Dr. Cullen was entitled to resign without the assent of the guardians I do not propose to offer any decided opinion, because it does not arise, having regard to the view of the Court as to assent by the guardians to the resignation. For myself, however, I desire to say that I have the gravest doubt that the office can be resigned without the guardians' assent. The Articles relied on cannot be read *per se*. They cannot in law alter, nor do they in fact purport to alter, the character or the tenure of the office. "Resign" in Article 29 must mean "effectively resign," not "attempt to resign" or "purport to resign"; and to ascertain what is resignation within that Article we must first determine the character of the office, and that we can learn from the statute only.

The office is a freehold one, and its tenure is *quamdiu se bene gesserit*. The statute confers no express power of resignation, and I doubt whether at common law there is, under such circumstances, any power in the officer to resign without the consent of the appointers—the guardians. I should feel still more difficulty in holding that such a power if it existed could be exercised

without reasonable notice. *The Queen* v. *Neligan* (1) is not in point. In his judgment there May, C.J., distinguishes the case before the Court from those of officers of a corporation who could not resign without the assent of the corporate body. He says:—"These were cases of *public* responsible duties, to be performed by *public* servants, and such a principle would be properly applicable to such cases. But the surgeon of an infirmary is merely the *paid servant* of the governors, who receives a salary for his personal services. The governors apparently *may dismiss him* at any time arbitrarily, and by way of *converse* it would appear that it was competent to him at any time to resign."

The difference between that case and the present is complete. Here, Dr. Cullen is a *public* servant. He has *public* duties, and most responsible *public* duties, to discharge; and the guardians cannot dismiss him, either arbitrarily or at all. The question, although immaterial here, is one of grave public importance, and I desire to hold myself absolutely free to determine it whenever it may arise hereafter.

For the same reason it is unnecessary to consider whether Dr. Cullen's letter is a resignation as distinguished from an offer to resign. I assume it to be the latter, and to require acceptance by the guardians to operate to vacate the office.

This letter came before the guardians at their meeting of the 9th May. What took place at that meeting did not, in my opinion, amount to an absolute refusal to accept the resignation. No doubt the guardians did not *then* accept it. They continued Dr. Cullen temporarily as their officer; but, notwithstanding this, as there was nothing amounting to an absolute refusal to accept it, the offer to resign continued to remain open, as did also the power of the guardians to accept it.

On the 15th May the Local Government Board wrote to the guardians in the following terms:—"The Board desire to point out that, Dr. Cullen having tendered his resignation, the office of dispensary medical officer thereupon became vacant, and it is now the duty of the board of guardians to take the necessary steps to elect a duly qualified person to fill the vacancy."

At their meeting of the 16th May the guardians passed a

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resolution which, treating the tendered resignation as still open for their consideration, put on record their opinion that they were entitled to have an opportunity to inquire into the circumstances under which the Local Government Board's threat of dismissal, which induced the tender of resignation, had been made. I think it but fair to the guardians to state that, whilst on the one hand the Local Government Board were at liberty to remove Dr. Cullen from his office by sealed order, if they were willing to undertake the responsibility of proving in a Court of Law "due cause" for his dismissal, on the other hand when, instead of accepting this responsibility, they required the guardians actively to interfere by calling for his resignation, and thus assume a responsibility that the Local Government Board were not entitled to impose upon them against their will, the guardians were well warranted in refusing to accept that responsibility until they were themselves satisfied, by inquiry into the circumstances which it was alleged called for such action, that it was right to do so.

The resolution of the 16th May having been furnished to the Local Government Board, their secretary, on the 22nd May, wrote to the guardians as follows:—"Dr. Cullen having tendered his resignation as medical officer of the Blanchardstown and Castleknock dispensary district, the office thereupon became vacant, and the only course now open to the guardians is to take the requisite steps to elect a duly qualified person to the office as already directed. The Board at the same time think it well to observe that the guardians cannot legally pay any salary to Dr. Cullen from the date of his resignation."

The letter adds that the transcript of the shorthand-writer's notes taken at the two inquiries has already been forwarded to the district council.

This letter of the 22nd May was laid before the guardians at their meeting of the 23rd, and it is on the proceedings at this meeting that I base my judgment.

It was first proposed and seconded that this letter be referred to the special committee appointed on the 9th May. It does not appear, nor is it material, whether this proposal was carried or even put to the vote. It was then proposed by E. M'Gough, Esq., seconded by M. Farrell, Esq., and resolved: "That Dr. Cullen,

medical officer of the Castleknock district, be appointed by this board of guardians as *locum tenens*, pending the report on the case by the committee appointed by this board, *as otherwise the district will be left without a medical officer.*"

Affidavits have been filed by the proposer and seconder of this resolution as to the intention in their minds in bringing it forward; but I need not say that those affidavits are not receivable in evidence to qualify or affect the ordinary meaning of the words of the resolution itself.

This appointment of *locum tenens* appears to have been made under Articles 22 and 25 of the Order of 24th February, 1899. Article 25 provides:—"In case of the death or *resignation* of a medical officer provision shall in like manner, as provided in Article 22, be made by the guardians for the performance of the duties of medical officer by a person duly qualified in accordance with Article 14, until the appointment of a medical officer shall have been duly made in accordance with Articles 12 and 13 of this Order."

The Article thus made applicable to the case of resignation, viz., Article 22, provides, *inter alia*, that the guardians shall either continue the substitute previously employed by the relieving officer, or make such other arrangements as they shall deem fit for the discharge of the medical officer's duties during his temporary incapacity.

These are the circumstances of the case, and the question is, what is the legal effect of the resolution of the 23rd May?

The guardians, warned—whether rightly or wrongly I do not now decide, but being warned by the letter of the 22nd—that salary could no longer be legally paid to Dr. Cullen as matters then stood, proceeded to alter the relation between them and him. They employed him in a new capacity, viz., as *locum tenens*. They had no power so to employ him, except in the case of his resignation having taken effect; and they had power to make his then pending offer to resign an effective resignation by assenting to it. In my opinion this employment involved, in law, an assent to and an acceptance of the resignation. Again, the concluding words of the resolution, "as otherwise the district will be left without a medical officer," are a declaration that the

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office of medical officer is vacant; and such a declaration made at such a time, in itself, and without any employment thereunder, would in law involve an acceptance of the then pending resignation.

The case would have stood thus if the resolution of the 23rd May had stood by itself, and had not been induced by the Local Government Board's letters of the 15th and 22nd May, 1900. What is the effect of those letters?

In the view which I take of the case I am obliged to assume, for the purpose of my decision, but without actually so deciding, that the statements in those letters, that the mere tender of resignation vacated the office, were inaccurate; but there can be no doubt that they were honestly made in a belief in their truth. I assume, then, that the guardians, in passing the resolution of 23rd May, acted under an innocent mistake, caused by the Local Government Board. I cannot, however, hold that such a mistake rendered their action absolutely void; and if it did not, the office was vacated, and no subsequent act has restored, or in my opinion could restore, it.

Some argument was founded on the position of Dr. Cullen, who, it is said, held two independent offices, viz. that of medical officer of the district under the guardians, and medical officer of health under the rural district council. It is unnecessary to discuss this argument more particularly than to say that, although he held two offices, they were not independent ones. Under s. 11 of the Public Health Act of 1878, the medical officer of the district is *ex officio* medical officer of health. It was not necessary, nor indeed was it right, for the Local Government Board to require the rural district council to call upon Dr. Cullen for his resignation as medical officer of health. So long as he remained medical officer of the district under the guardians he could not vacate his office as medical officer of health under the rural district council. When his resignation of the former took effect, he *ipso facto* vacated the latter. I cannot, however, see what relevance these circumstances have to the questions to be decided here. I refer to them only out of respect to the gentlemen who urged them.

The remaining argument upon this question is that the resignation was obtained by the duress of the Local Government

Board. I shall not occupy public time by discussing whether such duress, if proved, would prevent the avoidance by resignation of an office the power of appointment to which is vested, not in the Local Government Board, but in the guardians. It is enough for me to say that, in my opinion, there is no evidence of duress. The Board had power to dismiss by sealed order when "due cause" for such dismissal existed. They had no arbitrary power. Their jurisdiction to dismiss depended upon the existence of "due cause," not upon their belief or determination that there was "due cause." Such a determination, if made by them, would be subject to review in this Court in any proceeding in which the vacancy of the office was in issue. Having this power, they held certain inquiries; and having arrived at the conclusion that Dr. Cullen should not be permitted to continue medical officer, they gave him the option to resign in order to avoid dismissal. If he desired to test the existence of "due cause" for his dismissal, it was open to him to do so by refusing to resign. On the other hand, if he did not desire further inquiry into his conduct, he was at liberty to accept the real or fancied advantages, if any, incident to resignation, as compared with those accompanying dismissal. But he was left free to choose. There was no wrongful act; nothing, in my mind, which in law amounted to compulsion or duress.

As to the second question—I mean that in relation to the existence of another remedy—I think it free from doubt that, on the true construction of sect. 8 of 14 & 15 Vict. c. 68, the power of the Local Government Board to appoint a medical officer in default of appointment by the guardians within a month, applies only when the previous officer has been removed by sealed order, and does not apply in the present case. Appointment under this section was the only alternative remedy suggested; and as it did not exist, the case is one for a mandamus.

The cause shown must be disallowed, and the conditional order made absolute.

Solicitors for the applicants: *T. T. Mecredy & Son.*

Solicitor for the guardians: *A. R. Carroll.*

Solicitors for Dr. Cullen: *William Mooney & Son.*

A. E. R. J.

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1901.

Oct. 30.
Nov. 6.

FURNIVALL & CO. *v.* O'NEILL (1).

(1900. No. 16,113.)

Arranging debtor—Preferential payment—Contract—illegality—Consideration—Forbearance to enforce claims under illegal contract—Bankruptcy Amendment (Ireland) Act, 1872 (35 & 36 *Vict. c.* 58), *sect.* 76.

On the 14th October, 1879, by a deed executed between O'Neill (an arranging debtor), and F., one of his creditors, reciting that O'Neill was compounding with his creditors, and that F. had agreed to become surety on O'Neill's promissory notes for the payment of the composition, and reciting that the condition of F., so becoming surety was that O'Neill should assign all his property to F., to secure him against loss as such surety, O'Neill thereby, "for the considerations aforesaid," undertook to pay F.'s debt (£215) in full, and that F. should hold the property to be so assigned to him as security for that debt. The parties were advised of the illegality of this transaction, but in April, 1880, by a deed, reciting the composition arrangement and the deed of 1879, O'Neill, "for the considerations aforesaid," mortgaged his shop and premises to F., to secure the repayment of (*a*) any sums paid by F. on foot of the composition notes, (*b*) the debt of £215 in full, with interest, and (*c*) all further sums payable by O'Neill to F. for goods to be supplied. O'Neill disappeared in 1882, leaving a balance of some £400 due to F. under this deed. In 1893, F. obtained from O'Neill's wife (the defendant), who had continued to carry on his business, promissory notes for £185 to secure the balance then remaining due on foot of the mortgage of 1880. This balance was made up of the £215, of moneys paid by F. to meet certain of the composition notes, and of moneys due for goods supplied since 1880, less certain payments on account from time to time. In 1900 the indebtedness under these notes had been reduced to £104, and F. now sued the defendant (Mrs. O'Neill) for that sum:—

Held, that the plaintiff must fail; that the deed of 1879, being an illegal agreement for the payment in full of F.'s debt, and the same consideration being the operative foundation for the entire of the mortgage of 1880, the latter deed was illegal and wholly unenforceable; and that the plaintiff's forbearance to enforce the mortgage of 1880 (of the illegality of which he had knowledge) could not constitute a good consideration to support the defendant's promise to pay what remained due on foot of that mortgage.

(1) Before Lord O'Brien, L.C.J., and Andrews, Gibson, and Boyd, JJ.

MOTION FOR JUDGMENT, pursuant to leave reserved at the trial.

The action was brought to recover £104 16*s.* 5*d.*, balance due for goods sold, and on foot of two bills of exchange for £8, and £9 14*s.* 7*d.*, drawn by the plaintiffs on the defendant, and accepted by her, dated the 1st April, 1893, and payable respectively forty-three and forty-five months after date. The particulars were given as—8th September, 1896, balance of account, £106 1*s.* 10*d.*; 4th November, 1896, bill, £8; 4th January, 1897, bill, £9 14*s.* 7*d.*; total, £123 16*s.* 5*d.* From this, £19 was deducted for various cash payments between the 10th October, 1896, and the 8th November, 1900, leaving the balance sued for, £104 16*s.* 5*d.*

The defence denied the sale and the drawing and acceptance of the bills, and pleaded that there was no consideration for the bills; that before action brought the defendant had satisfied the plaintiffs' claims by money-payments extending over twenty years; and that the plaintiffs' claim, if any, was statute-barred.

The case was tried before Mr. Justice Barton without a jury. It was agreed that the pleadings should be so amended as to comprise the issues arising at the trial. The learned Judge, having heard the evidence, abstained from judgment, leaving either side to move.

The following statement of the facts is taken from the judgment of Mr. Justice Andrews:—

"The plaintiffs' claim for £104 16*s.* 5*d.* against the defendant, Alice E. O'Neill, arose in the following manner.

"Gordon O'Neill, the defendant's husband, who carried on the business of a stationer, lithographer, and bookbinder in Limerick, became indebted to the plaintiffs, who are printers' engineers, for goods, including an engine and printing-machine, supplied to him by them in the year 1879. His indebtedness, on this account, amounted in the September of that year to £215 8*s.* He was at that time indebted to a number of other persons; and, on the 8th September, 1879, being unable to meet his engagements, he presented his petition for an arrangement with his creditors to the Court of Bankruptcy in Ireland, and made in that arrange-

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ment-matter a proposal to pay his creditors a composition of 7*s.* 6*d.* in the £, which was accepted and confirmed by the Court on the 14th November, 1879.

"On the 13th October, 1879, Richard Furnivall, one of the plaintiffs, signed an undertaking in the arrangement-matter, in consideration of the proposal being agreed to by the creditors, to become surety on the promissory notes for the payment of this composition. This undertaking, which was filed in the arrangement-matter, did not disclose that the plaintiffs were to obtain any further payment than the composition on their debts.

"On the 14th October, 1879, an agreement was entered into between Gordon O'Neill and Richard Furnivall, reciting the composition arrangement, and that Furnivall had agreed to become O'Neill's surety, on condition that O'Neill should assign all his property to Furnivall to secure him against any loss he might sustain as O'Neill's surety for the payment of the composition; and, 'for the considerations aforesaid,' O'Neill undertook to pay in full the debt of £215 8*s.* due to the plaintiffs, and that Furnivall should hold the property to be so assigned as security for that debt.

"By an indenture dated the 19th April, 1880, and made between Gordon O'Neill and Richard Furnivall, after reciting O'Neill's composition arrangement and the agreement of the 14th October, 1879, and that it had been further agreed that O'Neill should secure to Furnivall any further sums which might become due to him by O'Neill for goods supplied or otherwise, it was witnessed that, 'in pursuance of said agreement and for the considerations aforesaid,' O'Neill covenanted with Furnivall, on demand in writing, to pay Furnivall the said sum of £215 8*s.*, and all such sums as Furnivall might pay on foot of the composition, and all such sums as should thereafter become due to Furnivall by O'Neill for goods sold or otherwise, and that in case the said sum of £215 8*s.* and other sums aforesaid should not be paid on demand in writing, O'Neill should pay Furnivall interest thereon at the rate of five per cent. per annum; and it was further witnessed that 'for the considerations aforesaid' O'Neill demised to Furnivall his shop and business premises in Limerick, subject to redemption, and assigned to Furnivall all his

stock-in-trade, goods, and effects, and all his book and other debts, and all his other property except wearing apparel, subject to redemption; and the proviso for redemption was upon payment by O'Neill, on demand in writing by Furnivall, of the said sum of £215 8*s.*, and all such other sums as should be due to him by O'Neill as thereinbefore mentioned; and Furnivall was thereby empowered, in case of default by O'Neill in making such payment, to take possession of the property therein comprised, and sell the same, and out of the proceeds pay all the principal money and interest intended to be thereby secured.

"Prior to the execution of this deed of the 19th April, 1880, the plaintiffs were informed through a Mr. Bromley who was acting on their behalf, and Gordon O'Neill was also informed, of counsel's opinion that the agreement of the 14th October, 1879, was illegal, and that he could not advise a deed carrying out its terms to be executed. The parties, however, directed that the deed should be prepared; and, when it was settled by counsel, he returned it with a further opinion that he disapproved of it for the reasons mentioned. Both parties to this deed had thus actual notice before the execution of it of the illegality of the agreement that the plaintiffs' debt was to be paid in full; and there was (as the learned Judge stated) quite enough upon the evidence before the Divisional Court to warrant the inference that the agreement between O'Neill and Furnivall that the plaintiffs' debt should be paid in full was a secret one between them, and was concealed from the other creditors, and the learned Judge (as he stated in his judgment) entertained no doubt that it was.

"The illegality of this agreement was not questioned in the argument at the bar, but it was part of the contention for the plaintiffs that this illegality did not affect so much of the deed of 1880 as constituted a security for sums due by O'Neill to Furnivall (who represented the plaintiffs) outside the debt of £215 8*s.*

"In September, 1882, Gordon O'Neill left Limerick, and did not return, and where he went to did not appear. His wife, the defendant in this action, remained behind in possession of his business premises and other property, and continued to carry on his business. Part, and it would appear a considerable part, of

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the money required to pay the composition was provided by the plaintiffs, and goods to a small amount were supplied by them after the composition arrangements. Payments were made to them from time to time by Gordon O'Neill before he left in September, 1882, and at that date a sum of over £400 was, as the plaintiffs alleged, due to them on foot of Gordon O'Neill's liabilities to them under the deed of 1880, including his agreement to pay their debt of £215 8*s.* in full.

"Further payments were made to the plaintiffs by the defendant after her husband went away, and, some time afterwards, namely (as would appear from the evidence), in 1893, the defendant was informed by or on behalf of the plaintiffs that unless she undertook payment of what then remained due to the plaintiffs, they would sell the place under the deed of 1880; and she then, in order to escape from being turned out, as she feared she would be, accepted a series of bills payable to the plaintiffs for sums amounting to £185 14*s.* 7*d.*, being the sum then claimed by the plaintiffs as due to them on foot of the deed of 1880. Subsequent payments by the defendant reduced this amount to the sum sued for by the plaintiffs in this action, viz. £104 16*s.* 5*d.*"

Mr. Justice Barton, in his report of the trial, had left it to the Court to draw all inferences of fact, and had stated that, before him, *O'Brien, K.C.*, for the defendant, had submitted that, when Gordon O'Neill deserted the defendant in November, 1882, she came into the obligations of an illegal contract—illegal because it was a contract between debtor and creditor in an arrangement matter, under which the creditor was to receive a secret benefit—and that the *onus* was shifted, and that it lay upon the plaintiffs to prove that this contract was known to the other creditors; and counsel had relied upon the want of consideration in respect of the promissory notes, the alleged consideration being that the plaintiffs were giving up a right—a right, however, that did not exist at all, and was not enforceable. For the plaintiffs, *Redmond Barry, K.C.*, had submitted that a compromise, even of an ill-founded claim, was excellent consideration; that the defendant had signed the bills for the purpose of getting the plaintiffs to stay their hands, and that the plaintiffs did stay their hands; that no case could be pro-

duced supporting the proposition that the Court could look back into the minutiæ of such transactions after twenty years; that the creditors had not been injured in the arrangement matter, for they had been paid by the plaintiffs; that it had not been shown that the mortgage was in any way secret or concealed from any creditors, but on the contrary there was the fact of its registration, and its publication in the *Gazette*; that the *onus* lay upon the defendant to establish fraud or illegality, and this she had failed to do; and that (he urged) the defendant could not dispute the mortgage after using it as a defence against other creditors and against the sheriff.

The plaintiffs now moved the Court for judgment for the amount sued for; and the defendant, on cross notice, applied for judgment in her favour.

Redmond Barry, K.C., and *D. F. Browne*, for the plaintiffs, submitted that, even assuming that the agreement of October, 1879, was illegal, as being contrary to section 76 of the Irish Bankruptcy Act, 1872, that illegality would not affect the plaintiffs' right to sue upon their claim under the deed of 1880 in regard to any sums due by O'Neill to Furnivall outside the debt of £215 8*s.*—relying on *Sheehy* v. *Sheehy* (1), and distinguishing *Scott* v. *Gilmore'* (2)—and that the plaintiffs' forbearance to enforce their claims under that deed was good consideration, supporting the defendant's promise to pay the balance claimed as due.

[They also cited *Callisher* v. *Bischoffsheim* (3).

Ignatius J. O'Brien, K.C., and *C. Doyle*, for the defendant, relied on *Re Montgomery* (4) and the English decisions there reviewed. Such an agreement, by which one creditor secretly secured to himself a collateral advantage, was a fraud on the other creditors and contrary to public policy: the Bankruptcy (Ireland) Act, 1872, section 76. The plaintiffs' claim, founded

(1) [1901] 1 I. R. 259.
(2) 3 Taunt. 226.
(3) L. R. 5 Q. B. 449.
(4) 7 L. R. Ir. 27.

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on that deed was bad *in toto*, and the defendant was entitled to judgment: *M'Kewan* v. *Saunderson* (1) and *Mahalm* v. *M'Cullagh* (2).

Cur. adv. vult.

Nov. 6.

The judgment of the Court was delivered by—

ANDREWS, J.:—

[His Lordship stated the facts as above given and continued—]

It does not appear to be disputed, and the evidence of Edward Tudor, a member of the plaintiffs' firm, seems to admit, that if the plaintiffs' debt of £215 8*s*. be taken to have been discharged by the arrangement, nothing would now be due to the plaintiffs on foot of the deed of 1880; but it may be that in 1893 some amount, outside the £215 8*s*. was due to them on foot of that deed; and, although I do not find this shown by the evidence, I shall for the purposes of my judgment assume that this was so.

I think it clear that the main and leading consideration for the agreement of the 14th October, 1879, without which it would not have been entered into, was the undertaking that the plaintiffs' debt of £215 8*s*. should be paid in full, and that the main and leading object of the deed of 1880, without which it would not have been entered into, was to secure the carrying out of that agreement, which was plainly illegal as being contrary to the settled principle and policy of the law, applicable to composition arrangements with creditors as well as to bankruptcy, that no creditor shall be allowed to obtain for himself, without the assent of the other creditors, a preference and exclusive advantage over the others.

The 76th section of the Bankruptcy Amendment (Ireland) Act, 1872 (35 & 36 Vict. c. 58), is directed against illegality of this character; but the illegality is not confined to the particular acts mentioned in that section. The principle is general and independent of statute law. In the case of *Mallalieu* v. *Hodgson* (3), a debtor, who was compounding with his creditors for 6*s*. 8*d*. in

(1) L. R. 20 Eq. 65. (2) 27 L. R. Ir. 431; 29 L. R. Ir. 496.
(3) 16 Q. B. 689.

the £, agreed separately with the plaintiff to pay him a part of his debt in full. This was held to be a fraud on the other creditors, each of whom had (as in like cases of composition) agreed to forego part of his debt in consideration of all the others foregoing their debts in the same proportion; and it was laid down that where a creditor, in fraud of the agreement to accept the composition, stipulated for a preference to himself, his stipulation is altogether void. Upon the general principle I may also refer to the cases of *M'Kewan* v. *Saunderson* (1) and the authorities there referred to, and *Re Montgomery* (2), and to the learned judgment of Walsh, J., reported in the note, from which I may cite the following passage :—

> "In proceedings in Bankruptcy," [and the principle is equally applicable to composition with creditors] "from the earliest period of the code, the great principle of equal distribution of the bankrupt's estate among his creditors has been upheld, not only by applying the principles established with respect to compositions out of the Court, but further by statutory provisions declaring that any creditor guilty of the offence thereby forfeited his debt. From time to time, as the Legislature found such provisions inadequate to repress these frauds, penalties were added, and the language of the provisions enlarged so as to embrace every attempt of the kind. The 76th section of the Act of 1872 is the last of these provisions, and the words used in it manifest the anxiety of the Legislature to put a stop to these frauds."

Now I do not think that it can be disputed that where there are several considerations, some illegal and bad, and some good, and several agreements are entered into in the same instrument, founded on all the considerations, all the agreements are void, because it is impossible to say that the illegal consideration did not enter into each agreement and was not the main consideration which induced it. It is, in my opinion, beyond doubt that the illegal agreement to pay the plaintiffs' debt in full was the main and operative foundation for the entire of the deed of 1880, without which that deed would not have been entered into at all, and it follows that the entire deed was and is void and

(1) L. R. 20 Eq. 65. (2) 7 L. R. Ir. 27.

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incapable of enforcement by reason of the illegality to which it sought to give effect.

In the recent case of *Sheehy* v. *Sheehy* (1), decided on the Tippling Acts, the ground of the decision was that what was prohibited was not the sale of liquors in small or any quantities, but the recovery of the price of certain small quantities sold on credit; and so the security in that case was vitiated only to the extent of the irrecoverable part of the consideration. That decision does not affect this case, in which the main consideration was illegal as being against the principle and policy of the law.

The plaintiffs' forbearance, therefore, to put in force the deed of 1880, the illegality of which they had notice and knowledge of, and which they cannot be taken to have believed to be valid and enforceable, could not constitute a consideration which would support the defendant's promise to pay what remained due on foot of this void and unenforceable deed. If the Court were in this case to give judgment for the plaintiffs, it is obvious that it would be assisting them to carry out an illegal transaction; and with reference to that aspect of this action I quote the words of Lindley, L.J., in the recent case of *Scott* v. *Brown* (2) :—

> "Ex turpi causa non oritur actio. This old and well-known legal maxim is founded on good sense, and expresses a clear and well-recognized legal principle which is not confined to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality."

I may add that the illegality in this case is a continuing illegality, and is not removed by the length of time during which it has been in existence and acted upon.

The learned Judge who presided at the trial has reported that it was agreed that the pleadings were to be amended so as to comprise the issues arising on the evidence—in other words that the validity of the plaintiffs' claim was to be decided on the

(1) [1901] 1 I. R. 239. (2) [1892] Q. B. 728.

evidence. The order of the Court, therefore, will be that the hearing of the plaintiffs' and of the defendant's motions for judgment, which were heard together, is to be treated as one hearing, that the plaintiffs' motion be refused and the defendant's motion be granted; and, accordingly, that the verdict and judgment in this action be entered for the defendant, with her costs of the action, including her costs of the hearing of the motions for judgment.

The Lord Chief Justice has authorized me to state that he concurs in the result of the judgment I have given.

GIBSON and BOYD, JJ., concurred.

Solicitors for plaintiffs: *Connolly & Co.*
Solicitor for defendant: *James Doyle.*

A. E. R. J.

NOLAN *v.* THE GREAT NORTHERN RAILWAY COMPANY (1).

(1900. No. 14,021.)

Practice—Costs—Instructions for brief at trial—Refreshers—Model—Expert witnesses—Exceptional circumstances—Architect and surveyor—Builder and contractor—Medical witnesses—General Order LXV., Rule 64 (11).

In an action against a Railway Company for personal injuries to the plaintiff, in which the plaintiff recovered £450, the Taxing Master allowed two doctors who were called as witnesses for the plaintiff £17 17*s.* each for attendance, being £5 5*s.* a-day for each of three days the case was at hearing and £2 2*s.* for the day it appeared in the list but was not taken up, when the Court was adjourned upon the official announcement of the death of Her late Majesty Queen Victoria. These doctors were both on the staff of the Richmond Hospital, Dublin, where the plaintiff was under treatment. These allowances were objected to by the defendants as being in excess of

(1) In the King's Bench Division, before KENNY, BARTON, and WRIGHT, JJ.

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the allowances provided by Order LXV., Rule 64 (11), and the Taxing Master was asked to state his reasons and the grounds why he held the case an exceptional one. He reported that he considered the case exceptional from the time it occupied and the adjournment of the Court. He further stated that the special ground for increasing the daily allowances was that both doctors examined the plaintiff before the trial; that similar examinations had been made on behalf of the defendants by eminent doctors; that there was a conflict of medical evidence which rendered lengthened attendances during the trial necessary; and that both the doctors were men of eminence and authority in their profession:—

Held, by the Court of Appeal (affirming the decision of the King's Bench Division), that none of the grounds stated made the case exceptional, and that therefore the allowance mentioned in Order LXV., Rule 64 (11) could not be increased, that that sub-rule was made only to regulate the payments to be made for the daily attendance of witnesses, and that increased allowances to witnesses could only be given under Order LXV., Rule 22, or Order LXV., Rule 64 (10).

Held also, by the King's Bench Division, that an allowance of £22 6*s.* 8*d.* was not excessive for instructions for brief at the trial; that refreshers to counsel for the day on which the case appeared in the list but was not taken up, when the Court was adjourned upon Her late Majesty's death, should not be allowed; that the builder who had constructed the model of the scene of the accident did not come within the category of a professional witness, and should only be be allowed for his attendance at the trial at the rate prescribed for "esquires, bankers, merchants, and the like witnesses"; and that the plaintiff was not entitled to charge the defendants for the attendance of the doctor who had treated the plaintiff in the country, in respect of more than one of three occasions when the defendants had given notice that they required the plaintiff to be examined by their doctors in Dublin.

MOTION on behalf of the defendants for an order to review the taxation of certain items of the plaintiff's costs.

The action was one in which Joseph Nolan, an infant, suing by John Nolan, his father and next friend, claimed damages from the Great Northern Railway Company in respect of personal injuries sustained by the plaintiff at Inniskeen railway station upon the defendant Company's system. It appeared that the plaintiff was driving his employer into the station, when a swing-gate, which hung across one of the approaches to the station, swung over against the car, upsetting it, and inflicting injuries upon both the plaintiff and his employer. The hearing of the action was commenced before the Lord Chief Justice and a special

jury in Dublin, on the 21st January, 1901. It was resumed on the 22nd January, and was in the list on the 23rd January, when, in consequence of the death of Her Majesty Queen Victoria, on the previous day, it stood adjourned with all the other cases that appeared in the lists on that day. When the Courts resumed business on the 26th January the hearing was again resumed, and the jury awarded the plaintiff £450 damages.

The plaintiff's bill of costs was furnished at £393 14*s.* 3*d.* The first item questioned by the defendants upon this application was item 88, which was as follows:—"Instructions for trial brief, including numerous attendances in Dundalk, Inniskeen, and Dublin; conferring with the plaintiff and his surgeons; also with the constabulary and attendances; instructing the photographer for preparation of photographs, and attending with photographer to obtain photograph of the exact position of the gate when the accident happened; attending on engineer relative to the preparation of model and with him at the scene of the accident; also attendances and correspondence with defendants' solicitors relative to the examination of the plaintiff in the presence of the surgeons of the plaintiff and the defendants respectively, and numerous attendances with a view to obtaining necessary evidence for the trial of the case." For this £50 was charged, which was reduced by the Taxing Master to £22 6*s.* 8*d.*, and it was now sought to have it further reduced,

In items 129–130 refreshers to counsel (£4 4*s.* to each of the two seniors and £2 2*s.* to the junior), together with dockets and attendances, were charged for January 23rd, the day of the adjournment, in consequence of the Queen's death, and in items 139–147 refreshers of £2 2*s.* to each of the three counsel, with dockets and attendances, were charged in respect of January 26th, when the case was resumed and concluded. The Taxing Master allowed all these items, and the defendants now appealed against the allowances belonging to the 23rd January.

Item 175 was: "William Beck, architect and surveyor, as *per* account, £28 11*s.*," in respect of which the Taxing Master allowed £23; and item 176, "Joseph Parke, builder and contractor, as *per* account, £37 1*s.*," in respect of which the Taxing Master allowed £25 10*s.* The evidence of these witnesses was conversant

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with the measurement of the scene of the accident and the preparation of a very elaborate model of the gate and its supports and surroundings. The objection of the defendants to the Taxing Master's allowance to Mr. Beck was not persisted in during the arguments, but his allowance to Mr. Parke was contested upon the ground that it included four attendances at the trial at £3 3*s.* a-day, the scale-allowance for professional witnesses, while he as a builder and contractor did not come within the category of a professional witness.

Item 181 was: "Surgeon Morrison, as *per* account, £42." Surgeon Morrison, who resides in Dundalk, was the doctor who had attended the plaintiff in the country after the accident, and upon three occasions upon which the defendants intimated to the plaintiff's solicitor that they required their doctors to examine the plaintiff in Dublin, Surgeon Morrison journeyed to Dublin in order to be present at the examination. His charges were made up as follows:—Three consultations in Dublin by arrangement with the defendants' solicitors, £5 5*s.* each; three first-class return tickets in respect of these occasions, £3 3*s.*; attendance in Court, five guineas a-day, £21; two first-class return tickets in connexion with attending the trial, £2 2*s.* The Taxing Master had reduced this item from £42 to £32 12*s.* This reduced allowance was questioned by the defendants, firstly, upon the ground that his attendance at the examinations of the plaintiff in Dublin was unnecessary, and was not a matter in respect of which the defendants should be charged; and, secondly, that as a medical witness, residing more than five miles from the place of trial, his proper allowance for attendance at the trial under (E) of Order LXV., Rule 64 (11) was £3 3*s.* per day, and no more.

Item 182 was: "Surgeon Myles (Surgeon to Richmond Hospital, where plaintiff was being attended to), as *per* account, £54 12*s.*," and item 183, "Dr. O'Carroll (Doctor to Richmond Hospital, where plaintiff was being attended to), as *per* account, £36 15*s.*" The Taxing Master allowed £17 17*s.* in respect of each of these items, being £5 5*s.* a-day for each of the three days during which the case was at hearing, and £2 2*s.* for the day on which it appeared in the list, but was not taken up. These allowances were objected to by the defendants upon the ground that upon

the scale provided for in Order LXV., Rule 64 (11), the fee for medical men resident within five miles of the place of trial is restricted to £1 1*s.* per day, subject to the proviso that "in exceptional cases the Taxing Master may increase the above allowances on special grounds."

During the argument the Court requested the Taxing Master to state the principles upon which he acted in making these allowances. The following were the questions put to him, and his answers:—"It appears that Drs. Myles and O'Carroll have been allowed for their attendances at the trial at rates exceeding £1 1*s.* a-day mentioned at (E) in the schedule of fees. The Taxing Master will please say on what grounds the higher rates were allowed, and especially:—(1) In what respect is the present case an exceptional one? The case appeared to me an exceptional one from the time it occupied, and I may add the interruption that occurred in the trial, which was adjourned over the 23rd and 24th January. (2) What are the special grounds on which the Taxing Master increased the scheduled allowances? The special grounds for increasing the scheduled allowances were Drs. Myles and O'Carroll made an examination of the plaintiff before the trial. Similar examinations had been made on behalf of the defendants by eminent doctors. There was a conflict of medical evidence which rendered necessary lengthened attendances and special attention by the medical witnesses during the trial. Both Drs. Myles and O'Carroll are of great eminence and authority in their profession."

Chambers, for the defendants, upon the question of the allowance to the medical witnesses, referred to *Maconchy* v. *The Bank of New Zealand* (1).

O'Shaughnessy, K.C., and *M'Loone*, for the plaintiff, referred to *Rooney* v. *Langtry* (2).

(1) [1900] 1 I. R. 22. (2) 31 L. R. Ir. 175.

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NOV. 25.

KENNY, J. :—

This is a motion by the defendants for review of the taxation of the plaintiff's costs. The action was tried in the month of January in the present year, and the plaintiff recovered a verdict. It was brought to recover damages for personal injuries, and the questions that now arise before us deal, firstly, with the instructions for brief at the trial; secondly, with refreshers to counsel for the day on which Her late Majesty died; thirdly, with the fees of Mr. Beck, an engineer, and Mr. Parke, a builder, in connexion with measurements and the construction and proof of a model for the trial; and, fourthly, with certain fees paid to the doctors who were examined. The trial lasted three days. It commenced on the 21st January, and was resumed on the 22nd January. It was listed for the 23rd January, which was the day on which Her late Majesty died, but, in common with all other cases in the law list, the hearing was adjourned. It was again in the list on the 26th January, and was disposed of, the plaintiff recovering £450 damages and costs.

The occurrence, which led to the injury which was sustained by the plaintiff, took place at Inniskeen, in the North of Ireland. The plaintiff had been thrown off a car by reason of a gate at the defendants' railway station having swung over against the car. He was attended by a Dr. Morrison, in the country, and was subsequently removed to one of the Dublin hospitals. In the course of his treatment at the latter he was visited on three different occasions by doctors on behalf of the defendants. Notice was given to the plaintiff of those visits beforehand, and it was thought desirable by the advisers of the plaintiff that his own doctor, Dr. Morrison, should also be in attendance on each of those occasions. He was also seen by Drs. Myles and O'Carroll, both of whom gave evidence at the trial on his behalf.

The first item we have to deal with is a sum of £50 charged by the plaintiff's solicitor for instructions for brief at the trial. The Taxing Master has reduced that amount to £22 6*s.* 8*d.* I am not going into the circumstances of that item, inasmuch as when the motion came on first the Chief Baron was a member of the Court, and we arrived at the conclusion that we could not interfere with the allowance by the Taxing Master of that sum of

£22 6s. 8d., and the Chief Baron stated our reasons for that determination.

The next items are a series from No. 129 to No. 137, and they represent refreshers and dockets of refreshers for the 23rd January, the day upon which the late Queen died. The Lord Chief Baron heard portion of the argument as to this item, and I have his authority for stating that he agrees with my brother Barton and myself in the conclusion we have arrived at: that these refreshers cannot be allowed; but at the same time we think that, as these refreshers are larger in amount than those which have been allowed in respect of the 26th, those for the latter date ought to be increased. Therefore, while we disallow all the items from 129 to 137, there will be a direction to the Taxing Master to allow the refreshers at the rate for the 26th that he has allowed for the 23rd.

The next item is No. 175, and we think we must deal with it in connexion with No. 176. As a result of the hearing before us, I think that no question now arises with reference to Mr. Beck's fees in item No. 175. Mr. Beck is an engineer, architect, and surveyor, and he made the measurements of the ground and of the locality where this accident occurred, and therefore with respect to attendance at the trial he would most properly come within (E) of Order LXV., Rule 64, Sub-rule 11, which contains the schedule of fees. Under (E) the schedule allows:—"For medical men, engineers, surveyors, and other professional witnesses, if resident within five miles of the place of trial—or ten miles, if there is a railway for three-fourths of the distance—per day not exceeding £1 1s.; if beyond that distance, per day not exceeding £3 3s. Mr. Beck's bill of charges was £28 11s. The Taxing Master took off £5 11s., which leaves £23. Deducting four days at three guineas a-day for attendance at the trial from that sum would leave £10 8s. for survey, &c., and we understood Mr. Chambers to withdraw all further objection to that £10 8s. Mr. Parke's charges are item No. 176. Mr. Parke is a builder, and he does not come within the category of a professional witness at all. He made the model, and it seems to have been an excellent model, and it is stated to have been of great use at the trial. Mr. Parke's claim was £37 1s., and off that was taken £11 11s., which left

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£25 10*s*. In that £25 10*s*. is included four attendances at the trial at £3 3*s*. a-day, viz. £12 12*s*., leaving £12 18*s*. in respect of the preparation of the model. With respect to this latter sum, Mr. Chambers does not now quarrel with its allowance, and he confined his argument to three guineas a-day in respect of the attendance of this witness at the trial. We think Mr. Chambers is quite right in his contention. Mr. Parke, not coming within the category of a professional witness, he can only be allowed at the rate of £1 a-day provided in (D) of the schedule as the charge for "esquires, bankers, merchants, and the like witnesses."

The remaining items are of a more important character than those I have been discussing. The first is conversant with Dr. Morrison's charges. Dr. Morrison's claim was for £42, and that was made up in this way:—three consultations in Dublin by arrangement with defendants' solicitors, £5 5*s*. each; three first-class return tickets £3 3*s*.; attendance in Court five guineas a-day, £21; two first-class return tickets, £2 2*s*. That makes £42 altogether. Off that the Master took £8 8*s*., leaving £33 12*s*. If the witness be allowed four days' attendance at the trial at five guineas a-day, as charged, that would be £21, and deducting that from £33 12*s*., would leave £12 in respect of the three visits to Dublin and return tickets. On the other hand, if the three visits be allowed at the rate charged, they would represent, with the railway fares, £18 18*s*., and leave £14 14*s*. to cover the four days' attendance at the trial and railway fare. We do not know how the Master appropriated the £8 8*s*. which he deducted.

With reference to Dr. Morrison's attendance with the defendants' doctors in Dublin, it appears that the latter required to see the plaintiff, who was in hospital, on three occasions, and on each occasion the defendants intimated their desire to the solicitor for the plaintiff. On each occasion Dr. Morrison was sent to Dublin to attend on behalf of the plaintiff. The question is whether under the circumstances the charges for these attendances of Dr. Morrison are to be allowed. We are of opinion that three such attendances ought not to be allowed as against the Company. It is, no doubt, desirable that the doctor who has been in attendance from the beginning and who can describe the

symptoms of the ailment and the appearance the patient presented in the earlier stages should be in attendance, but we think that one such attendance ought to be sufficient. We shall therefore direct that two of the attendances of Dr. Morrison at the examination by the defendants' doctors be disallowed.

As to Dr. Morrison's attendances at the trial, we think he ought to be allowed the sums that are provided for him by the schedule of fees. He comes within (E), and as he resides five miles from the place of trial, his charges should be allowed at the rate of £3 3*s.* a-day.

The next items are Nos. 182 and 183, representing the fees of Dr. Myles, a most eminent surgeon in the city of Dublin, who at the time was President of the College of Surgeons, and whose position deserves every consideration, and Dr. O'Carroll, who, I am sure, is also a doctor of eminence at his profession. What we have to consider is at what rate—as against the defendants—these two gentlemen, who saw the plaintiff before the trial with a view to giving evidence on his behalf, should be remunerated for their attendance on the days that the action was in the list. The schedule provides a fee of £1 1*s.* a-day in cases where the medical man is resident within five miles of the place of trial, but the following note appears at the foot of the schedule:—"In exceptional cases the Taxing Master may increase the above allowances on special grounds."

Having regard to the amount allowed and to this note, we thought it right to ask the Taxing Master for a further report as to why he did not confine himself to the schedule fees. The following are the questions we put to him, and his replies.

[His Lordship read the questions, and the Taxing Master's replies as given, p. 435.]

Dr. Myles' bill was £45 12*s.* The Taxing Master taxed off £27 15*s.*, leaving £17 17*s.* to be charged against the railway company in respect of Dr. Myles' attendances. How is that 17 guineas arrived at? The interpretation I put upon it is this—that Dr. Myles was allowed for three days at the rate of £5 5*s.* a-day, and for the other day on which the case appeared in the list, but was not taken up, £2 2*s.* The only question that arises is, whether Dr. Myles is to be allowed at a greater rate than

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£1 1s. a-day for his attendance. This qustion of the fees of professional witnesses came before the Master of the Rolls in a recent case of *Maconchy* v. *The Bank of New Zealand* (1) in June, 1899. The action was first heard before the Master of the Rolls on the 17th, 18th, 19th, and 23rd February, 1898; and eventually an issue was directed to be tried before the Court and a special jury of the county of Dublin. The issue was one of forgery, viz. whether a certain deposit receipt of the Bank of New Zealand, dated the 26th July, 1882, was endorsed by John Taylor Hamerton, deceased. The hearing of that issue lasted five days. Experts in handwriting were examined, and the jury found that the document had not been endorsed by Hamerton. On the taxation of the plaintiff's costs, the Taxing Master refused to allow expenses for those expert witnesses above what were prescribed by the schedule of fees, and his disallowance was supported by the Master of the Rolls. In dealing with the question at page 31 of the report the Master of the Rolls says :—"There remains the matter of witnesses' expenses. The solicitor was placed in a difficult position in a case which depended largely on expert evidence. I do not think the scale of fees for witnesses' attendance had in contemplation such evidence—that is, purely professional evidence—at all. There is, no doubt, a tack on at the end of the schedule :—'In exceptional cases the Taxing Master may increase the above allowances on special grounds'; but that applies not to any alteration of the character of the witnesses to be allowed for, but permits an increase from 7*s.* 6*d.* to £3 3*s.*, if a witness lives, not within 5, but, say, 45 miles away. It does not alter the rule that if a party calls a witness he is allowed on taxation only for payments made to him according to scale. It works hardly, as naturally expert witnesses will not attend for the fees payable to them under the taxable scale. Also the tendency of modern decisions is to approximate the costs as between party and party to those as between solicitor and client; but nothing in the rules contemplates the giving of special fees to special witnesses who have not personally seen or heard anything of the case merely because they are experts. Suppose a solicitor says: 'I cannot get satisfactory evidence for my case in

(1) [1900] 1 I. R. 22.

this country; I cannot obtain an expert witness of sufficient eminence; I must have Lord Kelvin or Sir Frederick Bramwell.' That would be a matter that the solicitor and his client would have to consider the cost of; they cannot onerate their opponent with the expense by saying, 'It was prudent to have Lord Kelvin, a man of great engineering capacity, for the trial.' That is, no doubt, an extreme case, but the question is always one of degree as regards expert evidence. I have not been referred to any authority as against the opinion I have expressed, that the expenses of expert witnesses cannot be allowed for as between party and party on a rate exceeding that fixed by the scale."

That is a most general observation of the Master of the Rolls, and we feel that by the comity of the Courts we are bound by it to a very large extent in this case. But there is a *dictum* in the earlier portion of the quotation, which I feel some difficulty in following—that in which the Master of the Rolls suggests that the special note at the foot of the schedule gives only a very limited discretion to the Taxing Master. I quite agree that it does not apply to any alteration of the character of the witness; but I do not think it can be restricted to a mere increase from 7*s.* 6*d.* to £3 3*s.* dependent on the distance of the witness's residence. The words are—"In exceptional cases the Taxing Master may increase the above allowances on special grounds." What allowances are these? They are to be found at the very beginning of the order:—"In taxing the allowances and expenses of witnesses the Taxing Master shall in *ordinary* cases have regard to the following scale." The note at the foot is conversant with "exceptional cases" just as the antecedent portion of the order deals with ordinary cases, and, in my opinion, authorizes an increase, in proper cases of a grave character, of any of the allowances set forth at A, B, C, D, and F of the schedule. The Master must, of course, in order to be justified in making an increase, be satisfied that the case was an exceptional one and that there were special grounds. When he gives the grounds for his conclusions, as he does here, we must, however slow we may be to interfere with his decision, be satisfied that his reasons are adequate. He considers that the fact of the case having taken three days at trial constitutes it an exceptional one, and that the eminence of the doctor is a special ground for

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allowing him in a party and party bill an increased fee. The issue in *Maconchy* v. *The Bank of New Zealand* (1) was five days at trial, yet an increase in the fees of the professional witnesses was disallowed. Having regard to these circumstances and to the language of the Master of the Rolls that:—"I have not been referred to any authority as against the opinion I have expressed that the expenses of expert witnesses cannot be allowed for as between party and party on a rate exceeding that fixed by the scale," we do not think we would be justified in allowing as against the railway company a greater sum than that allowed by the schedule. We are quite sensible of the tendency of modern authorities in favour of indemnifying the successful party as far as possible against the expenses he has incurred, and of more nearly approximating party and party costs to those between solicitor and client, but having regard to that case and to what we conceive to be the inconclusive and inadequate grounds on which the Taxing Master's decision was based, we do not think we would be at liberty to allow either of these doctors a sum for attendance at the trial greater than that provided by the schedule of fees.

At the same time, I would be glad, if it were feasible, that this important case should be taken to a higher Court, and that an authoritative rule might be laid down as to whether the schedule of fees applies in the extended way in which we are inclined to apply it, or is to be restricted as it was restricted by the Master of the Rolls, and also as to whether we are right in regarding the Taxing Master's reasons as insufficient to support his rulings.

I think that disposes of all the questions in the case, and the parties will be able to work out the figures having regard to our decision.

BARTON, J.:—

The only point upon which I wish to add anything to the judgment of Mr. Justice Kenny is the scale allowance of £1 1*s.* per day for attendance at the trial of the medical witnesses. I agree that the Taxing Master is bound by the scale in Order LXV.

(1) [1900] 1 I. R. 22.

Rule 64 (11), which for brevity I shall refer to as the Scale Rule, subject only to the qualification which is tacked on by the concluding words of the rule to the effect that in exceptional cases he may increase the allowance on special grounds. We have been referred to the decision of the Master of the Rolls in the case of *Maconchy* v. *The Bank of New Zealand* (1). The Master of the Rolls was in that case dealing with the allowance to expert witnesses as to handwriting in a case which involved an issue of forgery, but I cannot distinguish the case in principle from a case like the present, where we are dealing with the allowance to medical witnesses called to give evidence as to personal injuries in a negligence case. After carefully reading the Master of the Roll's judgment on the point at pp. 31, 32, I think his meaning amounts to this—He says that though the scale may not have had in contemplation purely professional evidence, and may work hardly in that respect, yet nothing in the rules contemplates the giving of special fees to such witnesses for attendance at the trial, or the allowance of special fees to special witnesses for attendance at the trial on account of their eminence, or on account of the preference of the party for their special services as witnesses. With all this, if I may respectfully say so, I entirely agree. One party cannot under the rule be allowed to onerate the opposite party with special charges for the attendance at the trial of witnesses, for whom he may have a fancy or preference, and who may be regarded as luxuries and not as reasonable requisites of the trial. The Master of the Rolls points out that expert witnesses may be allowed extra expenses for preparing themselves to give evidence, and perhaps this would include attendances on the plaintiff after the commencement of the action for the purpose of enabling the witness to give evidence at the trial; for example, when the doctors on each side attend not for the purpose of prescribing for or operating on the patient but for the purpose of examining the plaintiff with a view to giving evidence as to his or her condition at the trial. The point was not argued, but I think it deserves consideration. It may modify the force of the argument founded on hardship. The only part of the

(1) [1900] 1 I. R. 22.

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judgment of the Master of the Rolls which is not quite clear to me is his reference to the qualifying words at the end of the Scale Rule. He seems to limit their operation to the special ground of distant residence. Perhaps a word may have been omitted in the report of his judgment, because, if he meant that distant residence was an example of the "special grounds," that passage in his judgment would be more clear to me. I do not see what there is in these concluding words of the Scale Rule to limit their application to the distance at which witnesses may reside from the place of trial. However, quite irrespective of that passage in the judgment of the Master of the Rolls, I cannot hold that the reasons given by the Taxing Master rendered this an exceptional case within the meaning of the Scale Rule.

It has been argued before us that £1 1*s.* per day is not a reasonable allowance even as between party and party for a Dublin doctor's attendance at a trial like this one in Dublin, which must nearly always mean to him the loss of the best part of the morning or afternoon, and often the whole of the morning or afternoon or the best part of a day. There is great force in the argument that £1 1*s.* per day is not a reasonable fee, having regard to our knowledge of the value of a Dublin doctor's time and work, and that a somewhat larger fee might reasonably be deemed to be within the contemplation of both parties to a litigation of this kind, involving the attendance on both sides of skilled physicians or surgeons. It was also argued with great force that such a case as the present was an exceptional case, having regard to the serious nature of the injuries, and that the lengthened attendance required from the doctors at the trial were special grounds. I think, however, that arguments such as these must be addressed to the Court of Appeal or the rule-making authority. It seems to me that on the Scale Rule, and the authorities relating to it, we are obliged to hold that this scale of one guinea per day is binding on the Taxing Master, and that this is not an exceptional case within the meaning of the concluding words of the rule.

Before I leave the subject I may usefully point out that the practice in England is quite different. This scale or a scale corresponding thereto, which included an allowance of £1 1*s.* per day to professional witnesses for attendance at the trial, was contained

in the former English Rules of 1853; but it was not inserted in the English Rules under the Judicature Act. The allowances in England are regulated by English Order LXV., Rule 27 (9), which is identical with our Irish Order LXV., Rule 64 (10), being the rule which immediately precedes our Scale Rule. Accordingly, it was decided in *Turnbull* v. *Janson* (1), a case which was recently followed in *East Stonehouse Local Board* v. *Victoria Brewery Company* (2), that the scale is no longer binding on the Taxing Masters, and has been superseded by the general rule as to procuring evidence and the attendance of witnesses. The result is that in England these charges and allowances are discretionary for the Taxing Masters, while in Ireland the scale has been preserved in the rules, and of course cuts down and controls the more general preceding rule and binds the Taxing Master.

I dare say our rule makers acted intentionally and wisely in preserving this strict scale. In England there is a vast amount of litigation involving necessarily within the reasonable contemplation of the parties much larger expense than the ordinary run of litigation in Ireland. On the other hand, I dare say it might be reasonably suggested that a scale which was fixed so long ago as 1853 may not be quite up to date, and may require occasional revision or reconsideration in the light of common knowledge and experience of the value of the time and work of a profession like the medical profession in a city like Dublin.

However, that is not for us. We must interpret the rule as we find it, in the light of the authorities by which we are bound, and that being so, we must hold that the Taxing Master in this case must follow the amounts named in the Scale Rule, and that the reasons which he gives for treating this as an exceptional case with special grounds are not supported by the authorities, especially by the decision of the Master of the Rolls to which Mr. Justice Kenny has referred.

WRIGHT, J.:—

I only wish to refer to the allowances to the medical men. The case is of very great importance to the parties on that point,

(1) 3 C. P. D. 264. (2) [1895] 2 Ch. 514.

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because, as was stated by plaintiff's counsel, the plaintiff is a minor, and the money recovered in the action has to be paid into Court. The solicitor has not only to pay those doctors himself, but in the present case it was stated that the medical men had to be paid in full in advance, and therefore, if the Court disallows the money to those medical men, the solicitor will be out of pocket. That is a matter, of course, which we all regret. On the other hand, the case is of the utmost importance to railway companies, who have frequently to meet such cases in which there are always two, if not more, medical men to prove to the extent of the injuries. We are bound by the rule which will be found in Mr. Wylie's book at page 875, unless there are special grounds. I asked Mr. O'Shaughnessy several times what were the special grounds. The only answers I could get were that the case took a long time, and that it was a difficult case to prove, and that there was negligence in the construction of the gate, with the result that the gate and the car came into contact, and the plaintiff and his employer were thrown off. But again and again, when I got that answer, I asked how does that affect the evidence given by the medical men. This is a separate and distinct part of the case. Once you had negligence proved, then, and only then, did the province of the medical men arise. What are the grounds upon which the medical men in this case should get anything outside the schedule? The only other thing that could be suggested in answer to that question was, what we all know, that Dr. Myles is a gentleman of the highest eminence. I cannot help thinking that this case will press hardly on the plaintiff, and perhaps on one or more of the doctors, and while conscious that we have no power to give anything outside the rule, I shall be very glad if the Court of Appeal is able to lay down some decision for our guidance, which, of course, we will loyally follow.

It is said that the medical men had to spend a long time in Court. I do not think that is a reason. Sometimes the doctor gets his evidence taken out of its order, so as to be released from further attendance in Court, but sometimes the doctors seem to think that they are engaged in a sort of duel. They remain in Court to watch one another. The doctor for the Company listens to the evidence given for the claimant with a view to disproving what the

doctor on the other side has stated. One of the contingencies flowing from that is that they are apt to forget their character of witnesses to tell the truth and to think that they are advocates. I do not say that our decision will reduce this tendency, but at all events it will not induce them to remain in Court.

I do not think that any special grounds have been shown in this case, and, accordingly, I agree in the conclusion arrived at by the other members of the Court.

J. L.

The plaintiff appealed (1).

O'Shaughnessy, K.C., and *M'Loone*, for the plaintiff.

Gordon, K.C., and *Chambers*, for the defendants.

FITZ GIBBON, L.J. :—

The plaintiff's claim, in its present shape, is based on a misapprehension of the scope of the scale of charges for witnesses, fixed by Order LXV., Rule 64 (11). There is no similar scale in England; it was to be found in the Rules under the Common Law Procedure Acts; but under the Judicature Act the allowances for witnesses were included among general expenses. Order LXV., Rule 64, was introduced here for the purpose of controlling the powers of the Taxing Masters as to the expenses and allowances that come within it: Sub-rule 11 regulates "the expenses and allowances of witnesses in ordinary cases"; and it applies in the same way to all classes of witnesses, though the amount to be paid to each class is different. The several classes include labourers and journeymen, master-tradesmen and farmers, clerks and assistants, esquires and merchants, medical men and other

(1) In the Court of Appeal before FITZ GIBBON, WALKER, and HOLMES, L.JJ.

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professional witnesses; and, lastly, "other witnesses and females according to their station in life." Each class includes "other like witnesses," and therefore the scale applies to all witnesses. It is throughout a scale for payment *by the day;* it, in every case, provides an allowance for attendance as a witness only, and the Taxing Master must have regard to it in all ordinary cases.

It concludes—"In exceptional cases the Taxing Master may increase the above allowances on special grounds." Under Rule 22 "special grounds" must be such as can be "specified," and any increase must be judicially decided by the Taxing Master to be reasonable and proper. He cannot make any allowance under the scale, except for an attendance as a witness which comes under the scale; and he cannot increase the scale allowance, unless in an exceptional case, and then only on special grounds. We cannot give a general definition of "exceptional cases," or of "special grounds"; from their nature, their existence or sufficiency must be determined according to the particular circumstances of each case, as it arises. But the governing principle is that Sub-rule 11 deals only with the allowances to witnesses for attendance *as such*, and this allowance is to be measured by the number of days occupied in such attendance, thereby showing that the scale applies only to attendance at, and for the purposes of, the trial.

Thus the first question is, whether this was an "exceptional case"? Upon that question we can only look at the Report of the Taxing Master. The answer to the question, which was distinctly put to him, gives as the only reasons for holding this case to be exceptional—(1), that the trial occupied a considerable time; and, (2), that it was interrupted by the Queen's death. The length of time cannot make it an "exceptional case," for the allowance is proportionate to the number of days occupied. The Queen's death could not alter the case.

If the answer to the second question, as to "special grounds," contained anything to show that the case was exceptional, we would give the plaintiff the benefit of it, though the double condition must be satisfied, and there must be *both* an exceptional case and *also* special grounds for any increase. But the only "special grounds" stated by the Taxing Master are (1), that the witnesses

had made examinations of the plaintiff before the trial; (2), that there was a conflict of medical evidence; and, (3), that the witnesses were of great eminence in their profession. There are cases in which it may be necessary to procure the evidence of specialists, and Mr. Myles and Mr. O'Carroll are eminent in their profession; but the expense of procuring evidence is not within Sub-rule 11, and in this case the medical witnesses came in, not because of their eminence, nor as specialists, but because they attended the hospital to which the plaintiff was brought after the accident. If an eminent professional man happened to see an accident, or to witness any other cause of action of an ordinary kind, he could not on that account get more than the scale allowance for his attendance. Examinations of the plaintiff by the doctors may have been necessary before they could give their evidence, but that does not make the case exceptional, and the expenses of such examinations cannot be measured by the day, nor do they come within the scale which regulates the allowances for the attendance of witnesses. The conflict of medical testimony is nothing exceptional.

Mr. O'Shaughnessy's argument that a strict construction of Sub-rule 11 would place a party at great disadvantage, and would prevent him from recovering expenses to which he was reasonably entitled, rests on wrongly extending the scale to expenses to which it has no application. When such expenses as are here claimed are payable, they must be recovered under another rule.

Sub-rule 10 provides for just and reasonable charges properly incurred in procuring evidence. This rule exists in England, and under it an allowance has been given there to a witness in a patent case for preparing himself to give evidence, as distinguished from the allowance for his attendance as a witness. But when the Taxing Master acts under Sub-rule 11, he must comply with Rule 22, give a decision, and signify it "by note in writing made at the taxation," and his decision will be subject to review. Or the party may obtain from the Judge at the trial, or from the Court, under Rule 1, a special order for any "costs, charges, and expenses reasonably incurred for the purposes of any proceeding." Neither of these courses was taken here; the only question for us is whether the Taxing Master could increase the scale

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allowance under Sub-rule 11, and he could not, because that sub-rule does not apply to the charges claimed.

The expenses incurred by an injured person in obtaining medical treatment are part of his damages. Where a professional witness is examined as an expert, and has to prepare himself by previous study or experiments, or is qualified by special skill, the party who employs him must do so on reasonable terms, and must recover the costs in the manner, and subject to the control, provided for by other rules; but the opposite party cannot be made liable indirectly, by increasing the daily allowance fixed by Sub-rule 11 for the attendance of witnesses at the trial.

The decision of the King's Bench was right in principle, and the appeal must be dismissed with costs.

The only other matter mentioned—that of the costs of the day on which the Queen's death was announced—is one upon which no question should have been raised. The Court adjourned upon an occasion which affected the whole nation. The adjournment was not by order of the Judge; it was the act of all—litigants and professional men alike—who then separated as they came, as an act of respect, which can give no claim for fees against a suitor.

WALKER, L.J.:—

I concur. I do not say anything as to the second point. As to the former point, Sub-rule 11 of Rule 64, is a very special one,[1] which does not exist in England. It was meant as a check on the Taxing Master, but the proof that the conditions exist under which he may increase the allowances rests on the appellant, who must show—(1), that the case is exceptional, and (2), that there are special grounds. I do not wish to define what is an exceptional case; at present I only state what is not. It is not an exceptional case, because the damages were large, or on account of the length of time it occupied, or the scale which certain doctors might reasonably charge.

The Taxing Master has stated his reasons upon both heads. He tells us that the case appeared to him exceptional from the time it occupied and the interruption of the trial. He comes to the special grounds, and he says there was preparation for the trial

in that the doctors examined the plaintiff; that there was a conflict of medical evidence which rendered necessary lengthened attendances during the trial; and that the doctors were men of eminence in their profession. As to the conflict of medical witnesses, that always will exist as long as doctors exist, especially in the matter of prophecy as to how soon the patient will recover. As to the eminence of the medical men, Dr. Myles and Dr. O'Carroll did not attend as witnesses, because they were eminent, but solely because they were doctors of the hospital to which the plaintiff was brought.

As regards hardship on a suitor, it really does not exist, because there is a mode provided by Rule 22 of this same order, under which any special case can be dealt with.

I concur in the conclusion arrived at by my colleagues.

HOLMES, L.J.:—

Once it is understood that Rule 64 (11) of Order LXV. deals simply with the expenses of witnesses in coming to Court, and their allowances from day to day in attending the trial, as distinguished from remuneration to expert and other witnesses for needful preparation and investigation preliminary to giving evidence, the question for decision presents no difficulty. It is only when the case is exceptional, and there are special grounds, that the Taxing Master may increase the amount for travelling and attendance.

I agree with the other members of the Court that we should not endeavour to define what are exceptional cases, or what are special grounds, but I may give two illustrations. I have known a surveyor attending as a witness, sent by the Judge to a distance to make further measurements rendered necessary by reason of unexpected developments at the trial.

I have also known that in the progress of a case it turned out that the production of certain documents was required, the necessity for which had not been foreseen, and the witness who had custody of them was sent away to look for and produce them. These are, I think, instances of exceptional cases, and special circumstances, that would justify an increased allowance under the

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scale. But there is nothing before us showing that this is in any way an exceptional case, or that there are special grounds for giving more than the prescribed amount.

Solicitor for the plaintiff: *R. E. Dickie.*

Solicitors for the defendants: *Crawford & Lockhart.*

R. D. M.

K. B. Div. 1901. Nov. 19, 20. 23.

THE KING (JORDAN) *v.* THE ENNISKILLEN URBAN DISTRICT COUNCIL AND THE FERMANAGH COUNTY COUNCIL (1).

Local Government (Ireland) Act, 1898—*Application of Enactments Order* (22*nd December*, 1898), *Article* 26; *Article* 36 (10), *Rules vi. and viii.*—*County council order dividing an urban district into wards—Certiorari.*

An order of a county council under the Application of Enactments Order of 22nd December, 1898, Article 26, dividing an urban district into wards, being an inchoate or provisional order merely, imposing no obligation until confirmed by the Local Government Board, cannot be made the subject of *certiorari.*

CERTIORARI.

This was an application to make absolute, notwithstanding cause shown, a conditional order, dated the 22nd October, 1901, for *certiorari* to remove and quash a resolution of the respondent county council, dated the 14th August, 1901, and an order of the same council, dated the 4th September, 1901, made in pursuance of the powers contained in Article 26 of the Local Government (Application of Enactments) Order of the 22nd December, 1898, dividing the urban district of Enniskillen into wards.

The facts and the grounds relied upon by the applicants for the writ are, for the purposes of this report, sufficiently referred to in the judgment of the Court.

(1) Before GIBSON, MADDEN, and WRIGHT, JJ.

The county council and the Enniskillen urban district council both showed cause, alleging (*inter alia*) that the resolution and order in question were not a proper subject-matter for the writ of *certiorari*. Upon this point—

Serjeant Dodd and *Clancy*, for the prosecutors, contended that the order of the 4th September, so far as the county council was concerned, was a final order; it had passed out of their control; the provisions in Article 26 as to appeal could not render it less final; and the Court had jurisdiction on *certiorari* to inquire into its validity.

W. Moore, K.C., and *Brady*, for the district council of Enniskillen, and

Fetherstonhaugh, K.C., and *Pringle* (*The Solicitor-General* (*J. H. Campbell, K.C.*), with them), for the Fermanagh county council, showed cause.

They submitted (*inter alia*) that, till confirmation by the Local Government Board, the order of the council had no operation; it imposed no obligation, and effected no change; it was subject to appeal, and (apart from any appeal) to modification by the Board. The Court, therefore, should decline to interfere.

Cur. adv. vult.

Nov. 23.

The judgment of the Court was delivered by—

GIBSON, J.:—

This application for *certiorari* is brought by Messrs. Jordan, Crumley, and Little, the two former members of the county council of Fermanagh, and the last a member of the district council of Enniskillen. It seeks to quash a resolution of the county council, dated the 14th August, and an order of the same body, dated the 4th September, 1901, dividing the district of Enniskillen into wards.

The facts of the case are briefly these. The urban district council, at their monthly meeting, on the 5th August, in pursuance of a notice of motion specified in the summons for the meeting, decided to submit to the county council a proposal for

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Gibson, J.

a scheme dividing Enniskillen into wards. A notice to rescind this resolution was handed in, and the resolution, scheme, and notice of motion to rescind were transmitted to the county council. It is objected on behalf of the applicants that the resolution was illegal, as it related to extraordinary business, and section 43 of the Commissioners' Clauses Act, 1847 (10 & 11 Vict. cap. 16), prohibits extraordinary business being disposed of unless notice thereof be given at a prior meeting, which was admittedly here not done. Section 43 was (it is contended) made applicable to Enniskillen by section 41 of the Local Government Act, 1898.

The clerk of the county council on receipt of the papers prepared a summons, in which he referred to the documents as correspondence; but he sent to each member, with the summons, copies of the three papers—the resolution, scheme, and notice to rescind.

Twenty-nine out of the thirty members of the county council (including Messrs. Jordan and Crumley) attended the meeting in pursuance of the summons on August 14th. An objection made by Mr. Crumley, that the notice of motion to rescind had not been dealt with by the district council, was overruled; and Mr. Crumley then moved that the representation of the district council be not entertained. The motion was lost, sixteen voting against and twelve for. Mr. Hamilton was then appointed to hold the necessary inquiry. He accordingly did so on August 31st, and reported the result.

On August 30th (before the inquiry was held) a notice was issued to consider the report, and on September 4th the county council made an order in accordance with Mr. Hamilton's report, dividing the town into wards.

The applicants base their application on four grounds—(*a*), the proposal was invalid; (*b*), the summons for the meeting of August 14th did not specify the proposal as part of the business to be transacted thereat, contrary to the Application of Enactments Order of 22nd December, 1898, Article 36, clause 10, Rules vi. and viii. (1); (*c*), the county council resolution did not show that the council was satisfied that a *prima facie* case was made out for

(1) Vanston, page 200.

the proposal; (*d*), the notice for the meeting of September 4th untruly described the report as made, when in fact the inquiry was not yet held, and there was no report in existence.

For the county and urban district councils it was contended that there was no jurisdiction to award *certiorari*, and in addition to disputing the propositions on which the applicants' case was rested, counsel urged that the applicants who took part in the discussion without raising any technical objection were disqualified from applying for *certiorari*; and that in any case the wishes of the county council, having been declared after full and fair debate without surprise, the Court in its discretion ought not to allow *certiorari*.

The first question is that of the jurisdiction of this Court. If we are incompetent to award *certiorari*, we ought not to express any extra-judicial opinion on the other points raised.

The order made by a county council under Article 26 of the Enactments Order (1) may, within three months after the first notice of the provisions of the order, be petitioned against by the council of any district affected by the order, or by one-sixth of the Local Government electors in that district or in any ward therein, whereupon the Local Government Board shall cause a local inquiry to be held, and determine whether the order is to be confirmed or not (2). Under this enactment the Local Government Board have where there has been a petition an absolute discretion as to confirming an order; they could consider all kinds of objections, and it is certain that the order would not have any binding force until confirmed.

Where there is no such petition, or such petition is withdrawn, the Board "shall confirm the order." The meaning of this provision is not clear. Suppose that there is any omission to serve notices or issue the prescribed advertisements, would not the Board be at liberty to advert to the matter? However this may be, in confirming an order the Board may make modifications deemed by them to be necessary for carrying into effect the objects

(1) Vanston, p. 191.

(2) Application of Enactments Order, 22nd December, 1898, Article 26, clause 3.

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of the order. The order when confirmed is to be forthwith laid before Parliament.

The effect of the legislation clearly is that the order is inchoate, and can impose no obligation till it is confirmed. It has *per se* no more force than a provisional order before Parliamentary adoption. Can such an order be the subject of *certiorari*?

The present application is not for prohibition, which would be clear of the objection founded on the mere fact of there being no final order. Usurpation of jurisdiction may be restrained on the application of a stranger: *Mayor of London* v. *Cox* (1); and the party who applies may be prohibited as well as the Court which is exercising such illegal jurisdiction (2). Usually, therefore, prohibition precedes any order. After adjudication there is difficulty in obtaining prohibition where the order is good on its face: *Broad* v. *Perkins* (3). Whether prohibition would be an available remedy here, having regard to *Ex parte Kingstown Commissioners* (4), I need not consider, as the present application is for *certiorari* only, to support which there must be a final order. This is stated in Grady and Scotland, p. 138, and was admitted by counsel in the *Kingstown Case* (4), and he distinguished *Reg.* (*Frewen*) v. *Hastings Local Board* (5) on that ground. The distinction was accepted by Palles, C.B., who considered that the decision in the *Hastings Case* (5) might be supported, on the ground that as the order there was not final, the proceeding by *certiorari* was inapplicable. The same view was expressed by him in the *Wexford Case* (6).

It is argued that this order may be considered final, because it has passed out of the power of the county council. A provisional order would, however, be final in the same sense. Mr. Clancy contends that it is as final as an order of Justices, which though appealable may be quashed on *certiorari*. But such an order is essentially different. *Per se* it imposes an obligation, and even such an order is not the subject of *certiorari* pending an appeal. The present order has *per se* no validity, and cannot be treated as

(1) L. R. 2 H. L. at p. 279.
(2) *Ibid.*, p. 280.
(3) 21 Q. B. D. 533.
(4) 16 L.R.Ir. 150; 18 L.R.Ir. 509.
(5) 6 B. & S. 401.
(6) [1902] 2 I. R. 349.

a judicial determination of a final character. Like the resolution of August (which plainly could not be quashed), it is only a step to an effectual binding order.

No authority has been cited, and I am aware of none, justifying the extension of *certiorari* to an inchoate order like this of no intrinsic obligation. The point is of far-reaching importance, as similar orders are familiar under the Labourers and Tramways Acts.

Without, therefore, offering any opinion on the other matters discussed in argument, we must discharge the conditional order as contrary to the settled practice of the Court.

Solicitor for the appellants: *J. F. Wray.*
Solicitor for Enniskillen Urban District Council: *C. P. Falls.*
Solicitors for Fermanagh County Council: *Alexander and Irvine.*

A. E. R. J.

BYRNE *v.* LONDONDERRY TRAMWAY COMPANY (1).

Master and servant—Authority—Scope of employment—Passenger standing on the driver's platform—Consent of driver—Violation of rules.

The plaintiff arrived at a railway station at the outskirts of the city of Londonderry about nine o'clock at night. The station was one mile from the town, with which it was connected by the defendants' tramway. It was raining heavily, and there was only one tram-car, which was crowded both inside and on the back platform. The plaintiff got on the driver's platform, and the driver made no objection to his doing so. The plaintiff stated that he had travelled on the driver's platform some six times before without objection, and had always paid his fare. This evidence was controverted. The servants of the Tramway Company had orders not to allow anyone on the front or back platform, and notices were placed inside the cars that it was forbidden for anyone to stand there. During the journey the tram-car ran off the line owing to the points being set wrong, and the plaintiff was thrown off and sustained severe injury. No one else in the

(1) In the King's Bench Division before PALLES, C.B., and JOHNSON and GIBSON, JJ.

K. B. Div. 1901.

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tram-car was hurt. The jury found that the servants of the defendant Company had no authority from the Company to allow the plaintiff to stand on the driver's platform; that the plaintiff stood on such platform with the permission of the defendants' servants; that such permission was not with the consent of the Company, and was in violation of their rules; that the plaintiff was travelling on the platform as a passenger intending to pay his fare; that the notice alleged to be posted in the tram-car was not brought to the plaintiff's attention or seen by him; and that reasonable notice was not given to the public of the rule of the Company that passengers should not occupy the platform. They further found that the accident was caused by the defendants' negligence in the driving of the tram-car, and awarded the plaintiff £500 damages.

Held, by the King's Bench Division (Palles, C.B., and Johnson, J., *dubitante* Gibson, J.), that the inference should be drawn, from the course of the trial and the evidence, that it was within the scope of authority of the defendants' servants to take persons as passengers on the front platform, and that on such inference, coupled with the findings, the plaintiff was entitled to judgment for the damages found.

Held, by the Court of Appeal (reversing the decision of the King's Bench Division), that the findings of the jury negatived any authority in the driver to permit the plaintiff to stand on the front platform, whether derived from course of service, or scope of employment; that such permission was not an act of agency, but was a personal indulgence outside course of service or scope of employment; and that the defendant Company were not liable.

THIS was an action for damages for injury to the plaintiff by the negligence of the defendants in driving a tram-car, and was tried before Lord O'Brien, L.C.J., and a special jury. The material facts were as follows:—

The plaintiff, a surgeon practising in Londonderry, had been on the 21st June, 1900, out to Buncrana, whence he returned to Derry about nine o'clock in the evening. The Derry station, which is one mile from the city, is connected therewith by the tramway of the defendant Company. On the evening in question there was only one tram-car at the station; it was raining heavily, and the tram-car was crowded both inside and on the back platform. The plaintiff got on the front platform beside the driver; the plaintiff stated the driver made no objection; that he had travelled on the front platform some half-dozen times before and no objection was made, while he always paid his fare; and that the conductor collected on the front platform. When approaching

the depôt, to which there was a short branch line, and while going about six or seven miles an hour, the tram-car went down the branch line owing to the points being set wrong, but the horses went on the main line for a few yards. The car was jerked off the rails, and the plaintiff was thrown off and sustained serious injury. No one else on the tram-car was hurt, though some few of the passengers felt a slight shock.

For the defence it was proved that orders were issued to the drivers of the defendants' cars not to allow anyone to stand on the front platform, and that a notice was posted inside the cars forbidding passengers to stand on the front or back platform. The evidence of the driver on the occasion in question was that he had orders to let no one stand on the platform beside him, but that he did not tell the plaintiff to go down; he knew him well and did not want to tell him. Evidence was also given by the drivers of two of the other cars of the defendants, and by an inspector, that they on previous occasions had warned the plaintiff against standing on the front platform, and that he had left and gone to the top of the tram-car; but this was denied by the plaintiff.

At the close of the evidence, *Drummond, K.C.*, for the defendants, asked for a direction on the grounds that the plaintiff had not proved negligence; that there was evidence by the plaintiff's witnesses of contributory negligence; and that there was no evidence of authority from the Company or their servants to permit the plaintiff to stand on the front platform.

O'Shaughnessy, K.C., for the plaintiff, submitted that, in the absence of proof of any by-law or any resolution of the defendant Company on the subject of the management of the tramway, the defendants were bound by the action of the servants in control on the occasion in permitting the plaintiff to travel on the platform without interference or objection of said servants.

The Lord Chief Justice declined to direct, and left the following questions to the jury, whose answers to them are given :—

1. Had the servants of the Company any authority from the Company to allow the plaintiff to stand on the driver's platform? No.

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2. Did the plaintiff stand on the driver's platform with the permission of the defendants' servants? Yes.

3. If they did give him permission to do so, was it with the consent of the Company? No.

4. If not with the consent of the Company, was it in violation of their orders? Yes.

5. Was the plaintiff on the 21st June suffered without objection by the servants of the Company to travel on the platform of the tram-car? Yes.

6. Was the plaintiff travelling thereon as a passenger intending to pay his fare when demanded? Yes.

7. Were the defendants guilty of negligence in the driving of this tram-car on the said 21st June? Yes.

8. If yes, was the accident to the plaintiff caused thereby? Yes.

9. Were the notices alleged to be posted in the car upon which the plaintiff was travelling either brought to the attention of the plaintiff or seen by him? No.

10. Was reasonable notice given to the public of the rule of the Company that passengers should not occupy the platforms of cars? No.

11. Was the plaintiff guilty of negligence causing the accident? No.

12. Could the defendants by the exercise of ordinary care have avoided the consequence of such negligence? Yes.

13. What damages? £500.

The Judge abstained from giving judgment, but reserved liberty to either party to move for judgment.

The defendants now moved that the findings in favour of the plaintiff should be set aside, and a verdict and judgment entered for the defendants, or that a new trial should be directed, upon the ground that the findings were against evidence and the weight of evidence, and on the ground of non-direction and misdirection by the Judge. The plaintiff moved for judgment on the findings.

Drummond, K.C. (*Horner* with him), for the defendants:—

There was no evidence of permission by the defendants' servants. The person to have given such permission would have been the conductor, not the driver. It is not necessary to show that the plaintiff had notice of the absence of authority in the Company's servants; even if it were necessary the Company did all they could to give such notice.

[He referred to 1 Hodges on Railways, pp. 639, 640 (7th edition); *Dublin, Wicklow, and Wexford Railway Company* v. *Slattery* (1); *Cannon* v. *Midland Great Western Railway Company of Ireland* (2).]

O'Shaughnessy, K.C., and *Henry, K.C* (with them *D. F. Browne* and *Osborne*), for the plaintiff:—

The defendants are liable for the acts of their servants done in the course of service, and cannot escape liability by secret instructions given to the servants: *Limpus* v. *London General Omnibus Company* (3). There is authority in the driver to receive passengers. The defendants' case at the trial was, that their servants had not authority in fact to receive plaintiff on the front platform, and that plaintiff had notice of such want of authority. It was never suggested that it was not within the scope of employment. As to the plaintiff being on the front platform, see *Nolan* v. *Brooklyn, &c., Railroad Company* (4).

[They also referred to *Engelhart* v. *Farrant & Co.* (5); *Great Western Railway Company* v. *Bunch* (6); *Black* v. *Christchurch Finance Company* (7).]

Horner, in reply, cited *Farmy* v. *Great Northern Railway Company* (8); *Bank of New South Wales* v. *Owston* (9).

Cur. adv. vult.

(1) 3 App. Cas. 1155.
(2) 6 L. R. Ir. 199.
(3) 1 H. & C. 526.
(4) 41 Amer. Rep. 345, cited in Bevan on Negligence, p. 1200.
(5) [1897] 1 Q. B. 240.
(6) 13 App. Cas. 31.
(7) [1894] App. Cas. 48.
(8) [1898] 2 I. R. 352.
(9) 4 App. Cas. 270.

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May 11.

PALLES, C.B.:—

The contention that the defendants were not responsible for the act of their servant, in receiving the plaintiff upon the front platform as a passenger, was at the trial based exclusively upon the servant not having authority in fact so to receive him, and upon the plaintiff having had notice of this limitation of his authority. It does not appear to have been suggested that this act was not within the scope of the employment of the tramcar conductor. Had it not been, notice to the plaintiff would have been absolutely immaterial. The expression, "scope of employment," does not occur in any of the questions submitted to the jury, nor does it appear to have been once mentioned during the trial.

This satisfies me that the case was tried upon the assumption that such an act was within the scope of employment of the conductor; and if so, this motion ought to be decided upon the same assumption, although that fact was not so found by the jury, if there be evidence which could sustain such a finding had there been one. In my opinion there is clear evidence to that effect. The scope of employment of a tramcar conductor, in my opinion *prima facie* includes receiving as passengers any persons whom the owners of the car could, if present, lawfully receive; and as there does not appear to be any limitation, by statute, by-law, or otherwise, to the owner of a tramcar receiving and carrying a passenger on the front platform, the receiving of such a passenger is *prima facie* within the scope of the conductor's employment.

It follows from this that the person so received is lawfully upon the tramcar, and that the owner of the car is under a liability to him to use due care to carry him safely. Therefore, if the plaintiff was received by the conductor as a passenger, the finding of the jury negativing notice of the limitation of the conductor's authority negatives the defence.

The jury have found that the plaintiff was received as a passenger by the defendants' "servants" (in the plural); but they have not found specifically that he was so received by the conductor. Now such a receiving of a passsenger is not within the scope of the employment of the driver. The evidence,

however, was sufficient to support a finding, had there been one, that he had been received by the conductor, and no objection was taken to the use in question of the word "servants" as distinguished from "conductor." By an unfortunate mistake of the plaintiff's solicitor the conductor was sent home before the defendants, who it is stated had subpœnaed him, had an opportunity of examining him; but this circumstance is not relied upon in the notice of motion. Had it been, affidavits might have been filed in reference to it.

I am, for these reasons, of opinion that we should draw the inferences that the plaintiff was received as a passenger by the conductor, and that in so receiving him he was acting within the scope of his employment, although in violation of his secret instructions. The matters suggested upon the plea of contributory negligence were plainly for the consideration of the jury, and I see no reason to disturb the conclusion to which they came.

These inferences I have mentioned, coupled with the findings, amount to a verdict for the plaintiff. In my opinion, such a verdict should be accordingly entered, and there should be judgment thereon for the plaintiff with costs.

JOHNSON, J.:—

There is no question as to negligence of defendants by their servants, nor as to contributory negligence by plaintiff, nor as to amount of damages. The plaintiff is a local medical doctor, and frequently a passenger by this horse tramway of the defendant Company, known to defendants' servants, and on several occasions had travelled on the front platform of the tramcar, from which the driver drove his horses. The evidence was conflicting, whether or not the plaintiff travelling on the front platform was objected to. The evidence of servants of the defendant Company was, that on former occasions the plaintiff was told that it was contrary to their instructions, and against the regulations, that any person should travel on the front platform, and that, although on some occasions the plaintiff was allowed to remain there after being cautioned, yet that on more than one occasion when plaintiff was on the front platform, the car was stopped and the plaintiff mounted on the outside. This the plaintiff positively.

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denied, and said it was false, and that he travelled there without objection. It was for the jury (a special jury who saw and heard the witnesses) to decide to which testimony they would give credit, *testes ponderantur non numerantur*, and I do not consider that I have authority to supersede the jury in the discharge of their functions, *quemadmodum ad quaestionem facti non respondent judices* (*Altham's Case*, 8 Rep. 155 a); and itmay, I suppose, be presumed, in the absence of anything to the contrary, that this special jury had a fair amount of common sense and regard for their solemn obligation in the discharge of their duty. Further, the plaintiff's evidence on cross-examination was, "the conductor collects on the front platform," and this important piece of evidence was not controverted, though the conductor is the servant of the defendant Company, to whom they commit the management and control of the passenger traffic of the tramcar. Coming now to the evening in question, the jury had evidence that it was wet weather, that when the plaintiff came out of the station to the tramcar as a passenger it was, or appeared to be, full inside, and the rere platform (with its covering roof) so crowded with passengers that there was no room for him to stand there. The plaintiff then went to the front platform as he had done on previous occasions; the car had not started and no one warned him off.

Bradley, the conductor and servant of the defendant Company, was not examined. I collect from the report of the Chief Justice that he had been subpœnaed by the plaintiff, and when it became unnecessary to examine him for the plaintiff, the plaintiff's solicitor, with the sanction of plaintiff's counsel, told him he might go home. It may be fairly presumed that if he had been subpœnaed by the defendant Company, and could have given any evidence favourable to the defendants, the defendants' solicitor would have taken care that he was forthcoming when required for examination, and that Bradley would have applied to the defendants' solicitor for permission to leave; but however his absence occurred, no effort was made at any time on behalf of the defendant Company, by application to the Chief Justice or otherwise, to have his evidence at the trial when it was found that he had left. On the evening of the occurrence Bradley, the

conductor, and Gallagher, the driver, of the tramcar, made their report to Mr. M'Farland, the principal director of the defendant Company, and this report is absolutely silent as to the plaintiff being on the front platform, and mentions nothing in reference to that circumstance. Gallagher, the driver on the occasion, was not at the time of trial in the employment of the defendant Company on account of his health. He saw the plaintiff get on the front platform of the car and stand on his right hand, and his evidence is, "I said nothing to him about standing there; I got orders certainly to let no one stand on the platform beside me." It is a fact common to both sides in this action, that the platform at each end is similar in construction, with an overhanging or pent roof; that the car is not turned round to proceed in the direction opposite to that in which it has been proceeding, but the horses are merely detached from the one end of the tramcar and attached to the other end in the direction in which the car is then to proceed, so that the rere platform on the one journey becomes the front platform on the return journey, and the driver drives from the foremost platform, according to the direction in which the car is travelling. On cross-examination, Gallagher said, "I did not say to Mr. Byrne (plaintiff) to go down. I could have told him to go down, but I did not. I knew the gentleman well. I did not want to tell him." It is in my opinion a legitimate and proper inference from this evidence that Gallagher considered it was for the benefit and in the interest of his employers, the defendant Company, on that occasion to allow the plaintiff to remain where he was without remonstrance or objection, and there is no evidence of any interference by the conductor Bradley. It was raining; the plaintiff could not, or at all events supposed he could not, get shelter from the inclemency of the weather inside or under the pent roof or covering roof of the rere platform.

If Gallagher or Bradley had ordered the plaintiff off from under the shelter of the pent roof or covering roof of the front platform, the defendant Company might have lost the fare of the plaintiff, and irritated a local and frequent passenger against, and to the prejudice of, the interests of the defendant Company. There is no specific finding of the jury on this particular point; but it appears to me the inference which is proper, and ought to

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be drawn from the evidence, is that the driver and (in the absence of evidence to the contrary) that the conductor, each was acting in the ordinary course of his employment, and for what he considered the interest of his employer, in permitting the plaintiff to be and remain as a passenger on the front platform on that occasion. A tramway Company or any other Company can only act through their servants, and any one Company or individual who puts another in their or his place to do a class of acts in the particular employment in their or his absence, necessarily leaves him to act according to the existing circumstances of the occasion, and, notwithstanding any instructions to the contrary, for all acts done by a servant in the course of his employment, and within the scope of that employment, and for the benefit or in the interest of his employer, and not for some purpose of his own, the employer is responsible and liable to third parties, although the servant may have exceeded his authority, or violated even the express instructions of his employer. This, I think, is established by the leading case of *Limpus* v. *The London General Omnibus Company* (1), where the driver of the omnibus had express instructions not to do the very thing he did. I am therefore of opinion that there should be judgment for the plaintiff for the damages found.

GIBSON, J.:—

The only question in this case is whether the plaintiff was entitled to be on the driver's platform. I think that if the accident was not caused by his being there, at all events the risk was greatly increased. The plaintiff's case does not proceed on the ground that the Company's prohibition was allowed by them to become a dead letter. There was no doubt some evidence that the plaintiff on six occasions in the course of his constant use of the tramways had travelled without objection in the same way, and that fares were collected there. But waiver was not found by the jury, nor is there any finding that the Company held themselves out as carrying passengers on the driver's platform. We must deal with the case as one where servants in defiance of subsisting and effectual orders have allowed those orders to be violated.

(1) 1 H. & C. 526.

To enter verdict and judgment for the plaintiff it is necessary to hold that it was within the apparent scope of the servant's duty and employment to permit passengers to occupy the front platform. In this point of view we may dismiss previous transactions and treat the accident as arising out of an isolated occurrence.

Though there is no direct evidence that the conductor was aware of the plaintiff's position, and though it is an unfortunate circumstance that the conductor's evidence was not available owing to the mistake of the plaintiff's solicitor in sending him away, I will assume that the conductor as well as the driver permitted the plaintiff to stand on the front platform. It is said that such permission was within the scope of employment, because all arrangements as to the reception and distribution of passengers was necessarily left in the hands of those placed by the Company in charge of the vehicle, and that if the Company could sanction the plaintiff's occupation of the platform their servants could equally, as between the Company and the passenger, do the same thing, whatever the orders given to servants were, if the passenger was not made aware of such orders.

The difficulty that I feel is this. If it was necessary to keep the driving platform clear in the common interest of all the passengers, and if by the orders of the Company such platform was not to be used for the reception of passengers at all, would there not be at least a jury question as to the scope of employment, or rather as to the *locus* or area to which the conductor's duties were to extend? Could a railway passenger who was allowed by a servant to travel on an engine in defiance of the Company's rules recover damages for an accident which would not have occurred if he had been in an ordinary carriage? In such a case the Company could itself plainly authorize the act, but could an engine-driver or guard disobeying orders make the Company responsible? The difference between such a case and the present is one rather of degree than of principle. I doubt whether the principle laid down by Willes, J., in *Bayley's Case* (1) can apply if the front platform was obviously not intended for the use of passengers. Common experience would suggest that the place was

(1) L. R. 7 C. P. at p. 420.

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withdrawn from the scope of the conductor's authority. I know of no case directly in point on this question of implied authority in a case like this. *Bolingbroke's Case* (1) shows that an act of trespass done by a servant in the *bona fide* discharge of duty under general instructions may be outside the scope of employment; and in *Bunch's Case* (2) Lord Halsbury clearly thought that a railway company could make regulations as to a porter's duty which would make the doing of a certain act—the receipt of luggage—at a certain time, beyond the sphere of his duty.

On the findings as they stand I doubt if the plaintiff is entitled to judgment. They cannot, or rather ought not to, be supplemented by the Court drawing inferences of fact, as there is a direct conflict of evidence, and I find it hard to believe that the evidence of Dixon, Temple, and Smith, and the other witnesses examined for the defendants, was all deliberate invention, especially looking at the evidence of Constable Funston, one of the plaintiff's own witnesses. How is the Court as a matter of law to lay down that the placing of passengers on the driving platform must be within the scope of the conductor's duty? If the jury had found (1) that there had been an habitual infraction of rules from which waiver could be inferred, or (2) that the Company held themselves out as carrying passengers on the platforms, or (3) that under the circumstances of the case it was as a matter of fact within the scope of authority to take passengers on the platform, the case would have stood in a very different position. Without such findings, and in the face of express findings negativing authority, the Court is hardly in a position to declare as matter of law that the plaintiff was lawfully on the platform as passenger. The 6th finding relates to his intent and state of mind and not to any act binding the Company.

The case is on the border line, and I must assume that my doubts are unfounded, as my Lord and my brother Johnson are of opinion that the plaintiff is clearly entitled to succeed.

J. G. T.

(1) L. R. 9 C. P. 575. (2) 13 App. Cas. at p. 39.

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June 20, 21, 28.

The defendants apppealed to the Court of Appeal (Lord Ashbourne, C., Fitz Gibbon, Walker, and Holmes, L.JJ.).

Drummond, K.C., and *Horner*, for the appellants.

Ronan, K.C., *O'Shaughnessy, K.C.*, *D. F. Browne*, and *Osborne*, for the plaintiff.

[The following authorities were quoted in addition to those cited in the Court of King's Bench: *Bolingbroke* v. *Swindon Local Board* (1); *Bayley* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (2); *Poulton* v. *London and South Western Railway Company* (3).]

June 28.

LORD ASHBOURNE, C.:—

This is an appeal from the King's Bench Division, consisting of the Lord Chief Baron, and Johnson and Gibson, JJ., in an action arising out of a tramway accident, which took place in Londonderry some little time ago. The action was tried before the Lord Chief Justice, and resulted in a verdict for £500; the King's Bench Division affirmed the verdict, Gibson, J., not dissenting, though he stated that he entertained grave doubts, and from that decision the defendants have appealed. The facts lie in a narrow compass, and are not disputed. It appears that Dr. Byrne, a well-known doctor in Derry, was travelling on this tramway, and he got on the front platform by the side of the driver, for the purpose of the journey. Owing to the car going off the line at the junction with a branch line, in consequence of the points having been left wrong, the plaintiff was thrown off and severely injured. It is not disputed that if the Company are liable the plaintiff is entitled to substantial damages, but the defendants contend that they are not liable, because they had given express directions to their servants not to allow any passengers on the front platform of the car, and the plaintiff was guilty of contributory negligence. The driver was as usual on the front platform, and there were no other passengers there. There was a printed notice inside the car that it was not permitted by the Company that anyone should stand

(1) L. R. 9 C. P. 575, 577. (2) L. R. 8 C. P. 148. (3) L. R. 2 Q. B. 534.

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on the platform either in front or behind. One of the witnesses said he knew it was an offence. No evidence was given of any authority upon the part of the driver or conductor to permit passengers to use the front platform upon that occasion, and it was denied on the part of the Company that there was any authority apparent or real. It was further contended that the existence of any such authority was negatived by the evidence and findings of the jury. *Prima facie* one would say from what one generally sees that standing on the front platform is unusual; it is not provided with seats, and a person standing there is exposed to some danger. He might be thrown off or jerked off. If a driver or a conductor of a tramcar permits a person to stand on the platform, acting in defiance of his orders from the Company, can he make the Company liable? The case was tried very fully before the Lord Chief Justice, and he left a number of questions to the jury in order to prevent any possible discussion from arising afterwards on the facts. I shall read the questions and the answers given to them. [His Lordship read the questions left to the jury with the answers, *ante*, pp. 459, 460.] The jury awarded the plaintiff £500 damages. The result of these findings of the jury—especially in the answers to questions 1, 3, and 4—amounts to this, that the servants of the Company had no authority to permit anyone to stand on the platform, and if they gave such permission they were acting in violation of their orders. In my opinion the Company, under such circumstances, cannot be held liable. I do not see any question except whether there should be a new trial, or that judgment should be entered for the defendants. In my opinion we ought not to direct a new trial. The authority of the servants of the Company to permit passengers to occupy the platform was negatived by the findings of the jury, and I do not see any ground for imposing liability on the defendants. In my judgment, the verdict should be entered for the defendants, and the appeal should be allowed with costs.

FITZ GIBBON, L.J.:—

In my opinion, the defendants are entitled to judgment upon the findings of the jury, interpreted upon the assumption, which we are bound to make, that the Lord Chief Justice who tried the

case, and the defendants counsel who asked him to direct a verdict for the defendants, on the ground that there was no evidence of authority from the Company to their servants to permit the plaintiff to stand on the front platform, knew the course of the trial, appreciated the issues of law and fact upon which the result ought to depend, and, in short, knew their business.

My only doubt arises from the fact that the Lord Chief Justice abstained from giving judgment for the defendants, to which they were entitled if I have rightly interpreted the questions which he put to the jury. But the necessary conclusion, if I be wrong in this, would be that neither Judge nor counsel saw that a vital question of fact arose as to the course of the service and the scope of the employment of the servants who permitted the plaintiff to stand on the driver's platform; that this question was not left at all to the jury; and that there must be a new trial if, upon the facts and under the circumstances proved or admitted, there was sufficient evidence to support a finding for the plaintiff on that question. I shall, therefore, consider that point, and give the reasons for my opinion that, under the circumstances of this case, the burden of proving the affirmative lay upon the plaintiff, and that he failed to give any sufficient evidence to sustain a verdict in his favour. It follows, *quâcunque viâ*, that the defendants are entitled to judgment.

The Lord Chief Baron considered that the contention that the defendants were not responsible for the act of their servants in receiving the plaintiff upon the front platform as a passenger, was at the trial based exclusively upon the servants not having "authority in fact" so to receive him, and upon the plaintiff having had notice of this limitation of their authority. It did not appear to him to "have been suggested that this act was not within the scope of the employment of the conductor," and he was "satisfied that the case was tried upon the assumption that such an act was within the scope of the employment of the conductor." I cannot reconcile this view with the terms either of Mr. Drummond's requisition, or of the first third and fourth questions put to the jury. The words "any authority" in the first question, in their ordinary meaning, include any and every authority which could render the defendants liable for the act of their servants in giving the

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permission; every possible "authority in fact," as distinguished from authority arising from course of service or from scope of employment, was completely covered, and was absolutely negatived, by the third and fourth findings. With all respect, I suggest that an employer is liable for an act done by a servant in the course of his service, or in the scope of his employment, upon the ground of *agency* only; in other words, upon the ground that the act of the servant is the act of his master. The liability of the master must rest upon authority, and upon "authority in fact." "Apparent authority" is nugatory in law, if "apparent" means fictitious or non-existing. The only distinction which I can understand between "authority in fact" and "apparent authority" derived from the scope of a servant's employment, is that the one is derived from express instructions, and that the other is the authority which is shown to be conferred on the servant by the nature of his service.

Regarding the case in that light, it appears to me that the vital question on which the Judge and counsel must have seen that the result depended, when stated in the concrete form appropriate to the circumstances, was this—"Had the conductor of this tramcar authority to permit passengers to stand on the driver's platform?"

I agree with the Lord Chief Baron that upon that question notice to the plaintiff of an express prohibition was "absolutely immaterial," but I cannot agree in imputing to the defendants counsel, in the face of his requisition for a direction, that the case was tried upon the assumption that the act was within the scope of the conductor's employment, which the jury found to have been done "without the consent" of the defendants, and "in violation of their orders," and also without "any authority" from them.

The third and fourth findings completely negatived any authority in fact, and found the absolute opposite. The first finding was mere redundancy, if it did not negative any authority whatsoever, derived from agency, course of service, scope of employment, or anything else. The total omission of the use of the expression "scope of employment" from the questions submitted to the jury, and its not having been "once mentioned

during the trial," is inexplicable, unless the first finding was intended to cover the question of fact required to determine whether the defendants were liable upon that ground. I therefore hold that, on the findings, the defendants are entitled to judgment.

It is right also to consider the question whether there was sufficient evidence to sustain a verdict for the plaintiff, on the ground that the permission given to the plaintiff by the defendants servants was within the course of their service, or the course of their employment.

The Lord Chief Baron says that receiving a passenger on the driver's platform is not within the scope of the employment of the driver; but he holds that "the scope of employment of a tramcar conductor *prima facie* includes receiving as passengers any persons whom the owners of the car could, if present, lawfully receive." Johnson, J., differed from the Chief Baron as to the driver, for he went so far as to say that it was, in his opinion, a legitimate and proper inference from the evidence that the driver considered that it was for the benefit and in the interest of his employers, the defendants, to allow the plaintiff to remain where he was. As to the driver, he further says that it appeared to him that "the inference which was proper, and ought to be drawn from the evidence, was that the driver and (in the absence of evidence to the contrary) that the conductor each was acting in the ordinary course of his employment, and for what he considered the interest of his employer, in permitting the plaintiff to be and remain as a passenger on the front platform on that occasion." He considered this to be "established by the leading case of *Limpus* v. *The London General Omnibus Co.*" (1).

In my opinion it is not the law that the opinion of the servant as to what is for his employer's interest is the test of the employer's liability. I hold that the extent of the agency derived from employment is a question to be determined by the jury, so far as it is a question of fact, upon all the evidence and under all the circumstances in the particular case. I agree with Gibson, J. that "it is a jury question as to the

(1) 1 H. & C. 526.

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scope of employment, and in this case as to the *locus* or *area* to which the conductor's duties extended."

Regarding the question in this light, on whom did the burden of proof rest here? I say upon the plaintiff. Why? The Lord Chief Baron said that receiving a passenger on his platform was not within the scope of the employment of the driver. This is a conclusion of fact justified, if at all, by using the knowledge of human life which Judges as well as jurors possess. That same knowledge leads me to hold that, at least *prima facie*, a conductor's duty extends, *not* to receiving a passenger anywhere, but to receiving him in the place proper for passengers. An engine-driver could not make a railway company responsible by permitting passengers to ride on the engine. Could a tram-conductor make his employers liable by inviting a passenger to ride on one of the horses? That the driver could make his employers liable by considering that it was for their benefit, though in known violation of their orders, to allow the plaintiff to stand beside him is, to my mind, contrary to the essential idea of the scope of a driver's employment, and inconsistent with the service of the driver, and with the use to which his platform is *prima facie* devoted. In this I understand the Lord Chief Baron to agree. In *Limpus' Case* (1) Blackburn, J., says: "It is not universally true that every act done for the interest of the master is done in the course of the employment. A footman might think it for the interest of his master to drive the coach, but no one could say it was within the scope of the footman's employment, and that the master would be liable for damage resulting from the wilful act of the footman in taking charge of the horses." The same principle must be applied to Gallagher's "permission" to Dr. Byrne to stand where *prima facie* no passenger ought to stand, the place being intended for the driver only, and the proper performance of his duty requiring that he should be left free from intrusion. "You must not speak to the man at the wheel" is a regulation which does not require to be posted up, nor is it a rule made for the personal convenience of the helmsman. I apply the same principle, though in a less

(1) 1 H. & C. at p. 542.

degree, to the conductor. *Prima facie* the driver's platform is not within his jurisdiction. The scope of his employment *prima facie* does not extend to it, and, therefore, I say that, even if the conductor had allowed Dr. Byrne to take his place upon the driver's platform, mere passive permission to do so would *prima facie* have been beyond and outside the course of his service and the scope of his employment. If I am right in this, it follows that it lay upon the plaintiff to displace the presumption that he was on the driver's platform unlawfully in the legal sense—that is, that he was there without the authority of the defendants or of any agent of theirs who had any authority to permit him to occupy that position as a passenger.

I must, however, consider the specific evidence on which the plaintiff relies as sufficient to displace this presumption.

I distinctly decline to consider whether a passenger standing on the back platform would fall within the same rule. The evidence is clear that the injury to the plaintiff was caused by his being on the front, and not on the back, of the tramcar. His standing in front was the *causa sine qua non* of the injury. This is the only reasonable inference from the fact that no one else was hurt, and from the way in which the plaintiff was thrown off. The sudden check caused by the car striking the points and leaving the line threw the plaintiff off, because he had his face to the horses, was near the step, and was thrown forwards. Had he been inside, seated on the top, or even standing on the back platform, he could not have been thrown off as he was, and the escape of all the other passengers from even a shake, raises the inference that he would not have been hurt, any more than they were, if he had been standing on the back platform, where he would have been supported by the car itself.

I rest nothing on the evidence about the notices, which were applicable to both platforms. The essential difference to my mind between the two is that a passenger has *no* business to be on the driver's platform at all; but, though he ought not to be permitted to stand on the back platform, he is certainly entitled to use it for some purposes, and during a reasonable time; and I cannot lay down as matter of law that a passenger who, on a wet night, or while waiting for a vacancy inside or on top,

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stands for a while on the rear platform is acting unlawfully, or that it may not be within the scope of a conductor's employment to permit him to do so, he taking the additional care to avoid falling off which his more or less risky position demands.

The express evidence of permission is very weak. The authority to stand on the driver's platform, which Dr. Byrne relies upon as having been derived from the conductor, is not based upon any permission given on the night of the accident. There is no evidence that he had any communication with the conductor, or that the conductor saw him, or knew that he or any one else was on the driver's platform, when the accident happened. The authority alleged is proved, if at all, by antecedent general permission, or rather by an alleged recognised practice. There is evidence that the inside was full, and that the back platform was full or nearly so, but it is proved that others got up after Dr. Byrne, and it seems very doubtful whether, when the tram started, there was not some vacant room inside. It is sworn that there was still some standing room on the back platform, and it is certain that the seats on the top were not full.

Here is the whole of the evidence as to antecedent permission. *Dr. Byrne*: "I had travelled in front when I went this way at least half-a-dozen times. No objection whatsoever made. Always paid my fare. The conductor collects on the front platform. No one warned me off that platform. Temple did not do so, or anyone else. No one ever did." *Mr. Dick*: "I saw Dr. Byrne always standing behind driver in bad weather, and have seen others beside Byrne." *Gallagher*: "He only once before travelled with me. I said nothing to him about standing there." *Smith* "remembered him travelling on the week previous on three occasions on front platform beside myself." *Dickson*: "I saw him several times. He stood up on front platform on several occasions." All these witnesses for the defence specifically stated that they had expressly told him that his standing on the front platform was contrary to orders, but this, being denied, cannot be relied upon by the defendants at the present stage of the case.

Two graphic passages appear to me to point to the only reasonable inference from all this evidence. Funston, a witness for the

plaintiff, says: "I understood it to be *an offence* to stand on the platform." Gallagher, the driver, said: "I did not say to Dr. Byrne to go down. I could have told him to go down, but I did not. I knew the gentleman well. I did not want to tell him."

The only reasonable inference of fact to my mind is that Dr. Byrne got up on the driver's platform of his own motion, preferring to be alone, or preferring to travel there rather than be left behind, but knowing that he was going to what was not his proper place, and knowing that he went there on sufferance rather than by permission. In other words, he was presuming on his relations with the Company's servants as sufficient warrant for doing what he knew that their employers, if present, would not have permitted him to do. The act of the servants who permitted him to do this was not an act of agency for the defendants: it was a personal indulgence, outside the course of their service and the scope of their employment, and any person who accepts that position must, in my opinion in point of law, take the risks incident to it, and cannot hold the employers liable for the consequences of a permission which, under such circumstances, he must know not to be given by them. As against them, I therefore hold that there was no reasonable evidence that Dr. Byrne was lawfully on the driver's platform when the injury happened.

In *Limpus' Case* (1) the wrongful and improper act was an act of the driver, done *in driving the omnibus*. The issue was whether it was a wilful act done for a purpose of his own, but, being an act of driving, there was evidence that it was done in the course of his employment. The test put by the plaintiff's counsel (page 532) in argument was whether the servant in doing the particular act ceased to be the agent of his master. Williams, J. (page 537), held the master responsible, because he held that the misconduct of the servant in driving must be considered as having resulted from the performance of the duty entrusted to him as the driver. He makes this the test, and he only fortifies his conclusion by adding "and *especially* if he was acting for his master's benefit." Crompton, J. (page 537), based his judgment on finding that the injury resulted from an act done in the course of the driving and

(1) 1 H. & C. 526.

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management of the omnibus. Willes, J., said, "the law casts upon the master a liability for the act of a servant in the course of his employment, and the law is not so futile as to allow a master by giving secret instructions to his servant to discharge himself from liability." Byles, J., said, "If a servant acts in the prosecution of his master's business, for the benefit of his master and not for the benefit of himself, the master is liable." Blackburn, J., I have already quoted as to the footman. He says also, "A master is responsible for the illegal act of his servant even if wilful, provided it was within the scope of his servant's employment and in the execution of *the service for which he was engaged.*" A tram conductor is not engaged to put passengers on the driver's platform.

For these reasons I hold that the permission given by the conductor to Dr. Byrne to ride on the driver's platform was not covered by any authority, express or implied, and therefore that it was not a permission given as agent of the defendants, nor was it an act of the defendants.

I therefore hold that the judgment must be entered for the defendants in the action, with the costs of suit and of the appeal.

WALKER, L.J.:—

I feel the difficulty which I think affected Mr. Justice Gibson in entering a verdict for the plaintiff, as was done by the order appealed from, or for the defendants, which my colleagues think may, and ought to, be done.

I think the apparent scope of employment of a servant, and actual express authority given by the master to such servant, are different things. If an act done—say by a conductor—is within the apparent scope of this employment, such act, as regards a passenger, would bind the employer, though there were a direction given to the conductor, of which the passenger was ignorant. If he had notice of a prohibition, the case would be different.

I do not think the first question left to the jury was intended to get an answer as to the scope of employment, but to get one as to whether the conductor had express authority in fact from the employer to allow a passenger to stand on the driver's platform—a point to which much evidence was directed. If that were not

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so, I cannot see why the Lord Chief Justice did not enter judgment for the defendants.

The findings, I think, only establish as regards the opinion of the jury the following facts—that the plaintiff travelled on the driver's platform by the permission of the defendants' servants as a passenger, intending to pay his fare; that the servants were not authorized to give any such permission, and in fact had orders not to do so, but the plaintiff had no notice of any such prohibition.

As regards this question of apparent authority, what I conceive the law to be is, as laid down in *The Bank of New South Wales* v. *Owston* (1), that it covers every act lawful in itself, and which the Company itself could authorize. There are many instances in which the act in question, from its nature, could not be within the scope of the employment: for instance for an engine-driver—a case put in the argument—to allow a passenger to travel on the engine. I think it is in every case a question of degree, and in this respect the travelling on the conductor's platform would not be open to the same considerations as travelling on the driver's platform. It is not determined by the existence of a prohibition, unless the passenger was aware of the prohibition.

It is in most cases a question of fact for a jury, though there are many conceivable cases in which the case should not be sent to a jury, or if they found for a passenger, the verdict would be set aside. I think the test that should be applied to such a case as this is, was the position on the driver's platform in itself dangerous to a passenger or the conduct of the car, though the defendants were guilty of no negligence in the management of the tramcar? If the jury found it was so dangerous, I think as matter of law the permission to travel on the driver's platform could not be within the scope of the servant's employment.

The circumstance that a jury ought, according to our view, to decide a question of fact in a particular way does not in all cases turn it into a matter of direction, and on the whole I am not satisfied that there should not have been a question left to the jury. The opinion of the other members of the Court involves that if such question had been left, and answered in the plaintiff's

(1) 4 A. C. 270.

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favour, they would, nevertheless, have entered the verdict for the defendants, and as on the facts I think the jury would more properly have found for the defendants on the issue, I do not regret that they have felt strong enough to take that course.

HOLMES, L.J.:—

Mr. Ronan argued this case as if the members of the Court had never seen a street tramway. I do not purpose to deal with it on this basis. Both Judges and jurors must bring to the consideration of the questions they are called on to decide their knowledge of the common affairs of life, and it is not necessary on the trial of an action to give formal evidence of matters with which men of ordinary intelligence are acquainted.

We have seen tramcars drawn by horses through our streets for years; and most of us have travelled in them. The Londonderry cars are constructed on the pattern with which we are all familiar. The passengers are carried inside, and on the roof of the vehicle; and there is a small platform at each end of the car, from which a door opens to the inside and a staircase ascends to the top. The two platforms are precisely similar in make. From the one in front the driver, either standing, or sitting on, or resting against, a moveable seat, drives the horses, while the conductor stands on the one that is behind. The public obtain access to the car by the conductor's platform, going therefrom to the seats provided for them in the interior and on the roof. The driver's platform is used by himself alone. The door behind him is kept closed, and his position impedes the approach to the staircase. When the car reaches its destination both doors are left open for a few moments so that passsengers can leave at either end. On the return journey the driver and conductor change places, and before starting what had been the conductor's platform is converted into the driver's by closing the door of entrance and fixing in it the moveable seat, if there be one. I have no doubt that all these things were shown in the model exhibited at the trial, which was not, however, produced in this Court; and for my own part, I should have derived no greater information from it than from a model of my own dining-room.

It is to my mind absolutely clear that the driver's platform is

not constructed for the use of passengers at all, and that the conductor's is only intended to be used by them as a means of access to the parts of the vehicle—the inside and the roof—where seats are provided. I require no jury to tell me this, for it is the necessary inference from the structure of the car. It is also equally clear that the danger of accident is much greater to a passenger standing on either platform, when the car is in motion, than if he were seated inside, or on the roof. The platform is open and unprotected at the sides; and as the passenger cannot sit down, he is liable to be thrown off by jerks in crossing the points, or by the swing in rounding corners. It is safe enough for the conductor, who is accustomed to it, and is generally a young and active man, or for a cautious traveller who holds fast by some support, but is risky for the ordinary passenger. It is this risk that accounts for the prohibitory notices posted in the car, and for the plaintiff's witness, Constable Funston, saying that he understood that it was an offence to stand on the platform. The facts of this case afford convincing evidence of the reality of the danger, as if the plaintiff had been seated, he, like the other passengers, would not have sustained any injury from the very common accident of the car leaving the rails. It follows from what I have said that the plaintiff would not have been hurt if he had not been travelling on a part of the car that was not intended or constructed for the carriage of passengers; and I am of opinion that, unless he can show some special circumstances that attach liability to the Company notwithstanding his so doing, this action cannot be maintained.

The mode in which this is sought to be done is by alleging that he was permitted to stand on the platform by the defendants' servants. This is the point where there comes in the question of "scope of employment," which counsel for the plaintiff rightly regard as of supreme importance. Permission from servants, unless in giving it they are acting with authority from their employer, is of no avail; and such authority is sought in this case to be made out by means of the nature of the servant's employment. When a man engages a coachman or a butler, he is not supposed to lay down categorically all his duties. It is assumed that the very fact of the servant's employment in a particular capacity

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carries with it his master's authority to do the acts and discharge the functions appertaining, according to general usage, to his position; and strangers, in the absence of notice to the contrary, are entitled to deal with the servants on this basis. A servant may also be the agent of his master in matters outside the usual scope of his employment, but in such a case, the employment alone is not sufficient to establish agency.

The present case must be dealt with in both of these aspects.

No evidence was given, nor was any evidence necessary, as to what is done in the usual course of their employment by tram-drivers and tram-conductors. This is part of the common knowlege of Judges and jurors. We are all aware that it is the business of the drivers to attend to the horses, and of the conductors to start and stop the car, to look out for passengers, to take them up if there is room for them, and to collect their fares. But I am clearly of opinion that their employment does not carry with it a power to permit passengers to travel on a part of the car not constructed or intended for such purpose, where they are exposed to special risks, and by such permission to attach exceptional liability to their employers.

I was surprised to hear Mr. Ronan argue that this must have been assumed at the trial, as otherwise the third and fourth questions to the jury would have been unnecessary; but I cannot make this assumption in view of the first question, and of Mr. Drummond's requisition. I am satisfied that no such authority can be implied from the conductor's employment. It would be as reasonable to hold that a railway guard or porter has an implied authority to give permission to a passenger to travel on the engine, or on the roof of a carriage, and I am disposed to think that if the first question was not intended to cover implied authority of this kind, it was because the Lord Chief Justice took the same view of the law as I do.

There remains the second question:—Was there evidence, apart from the mere course of employment, that the conductors of the defendant Company had authority to give permission? If there was such evidence, it ought to have been submitted to the jury; and I believe that this was what the first issue was intended to cover:—"Had the servants of the Company any authority from the

Company to allow the plaintiff to stand on the driver's platform?" This question seems to me to include authority of every kind, and I think that the negative answer decides this case; nor am I at all puzzled by the fact that other questions were put, which in the light of this finding were unnecessary. The common practice of sending all the questions to the jury at the same time was followed in this case; and it is usual for the Judge to ask that all should be answered to prevent possible miscarriage.

As, however, the plaintiff's counsel have pressed on the Court so strongly that the first issue means something different from what it appears to mean, I have considered whether there is any evidence proper to be submitted to a jury, of authority from the defendants to their conductors to permit passengers to travel on the driver's platform. Apart from the mere fact of their employment, with which I have already dealt, the only evidence relied on for this purpose is the plaintiff's statement that he had travelled in this way about six times, his fare having been collected by the conductor on those occasions; and the evidence of Mr. Dick, who swore that he saw Dr. Byrne always standing beside the driver in bad weather, and that he had seen others beside Dr. Byrne. This evidence is to be taken in connexion with the statement of the only other witness produced on behalf of the plaintiff—that he understood it to be an offence to stand on the platform.

I shall assume that no objection was ever made on behalf of the Company to the plaintiff's use of the platform, although I cannot refrain from expressing surprise if the jury intended by their ninth finding to reject the evidence on this point of Smith, Temple, and Dixon, none of whom had any connexion with the accident to Dr. Byrne, and who seem to be otherwise disinterested. But with this assumption, what does the evidence amount to?

If the driver's platform was a usual stand for passengers, it could have been easily proved; but even the plaintiff does not say that he had seen it used by anyone except himself. It is clear that it was an exceptional thing for a passenger to stand on it, the principal exception being the plaintiff. Mr. Ronan tried to aid this meagre evidence by references to the conductor's platform; but the latter was necessarily used by passengers for the purpose of obtaining access to the car, and their presence there, which

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might be accounted for in different ways, can raise no presumption in regard to the platform at the other end. I am at a loss to know what is the inference which the Court is asked to draw from the evidence to which I have referred. I could understand the proposition that the tram-service had been so managed by the defendants' servants as to convey to the public that the driver's platform was an ordinary and proper place for the carriage of passengers; but Dr. Byrne and his two witnesses, so far from supporting this view, seem to me to disprove it. Their evidence only suggests, at the most, that an occasional passenger is allowed to travel in this way. The jury having found that this permission is in violation of the orders of the Company, I am unable to see how the defendants can be affixed with liability by reason of it. Even as regards the permission itself, there are difficulties in the way of Dr. Byrne. The plaintiff must rely on a general permission—for there is no evidence that he was ever seen by the conductor on the night of the accident; and I doubt if there is any evidence to show that he was given liberty to use the driver's platform whenever it suited him to do so.

I have added these observations for the purpose of showing, that even if the jury did not intend by their answer to the first question to negative every kind of authority, the defendants would, notwithstanding, be entitled to judgment; but I have no reason to think that the finding on the first issue did not dispose of the case. For these reasons, I am of opinion that the appeal ought to be allowed and judgment given for the defendants.

Solicitor for plaintiff: *C. R. Tillie.*
Solicitor for defendants: *P. Maxwell.*

R. D. M.

COUNTY DUBLIN COUNTY COUNCIL *v.* PEMBROKE URBAN DISTRICT COUNCIL (1).

K. B. Div. 1901. Dec. 12, 14.

(1900. No. 14,338.)

Local Government (Ireland) Act, 1898, *sects.* 51, 59, *and* 66—*Apportionment of county charges—Action on foot of a demand note—Contribution between urban district council and county council—Dublin Corporation Acts—Dublin bridge tax—Metropolitan police tax—Right to deduct uncollected and irrecoverable balances in respect of apportioned bridge tax and police rate—Right to credit for 5 per cent. deduction for cost of collection, etc.*

The plaintiffs sued the defendants for the balance (£99) due on foot of their demand note of the 5th October, 1899, for £16,170, for the services of the year ending 31st March, 1900. This balance (£99)—being 5 per cent. on the amounts apportioned on the defendants for bridge tax and police tax—the defendants disputed, on the ground (*a*) that they were entitled to deduct it for costs of collection, &c., under section 66, sub-sect. 4, of the Local Government Act, 1898, and (*b*) on the ground that it represented uncollected and irrecoverable rates for bridge and police taxes upon unoccupied premises.

Held, that section 51 imposed an unqualified duty on the defendants to pay the amount as set out in the demand note, and that the plaintiffs were therefore entitled to judgment for the full amount sued for, irrespective of the capacity of the defendant body to pay, or the power of the plaintiffs to make such judgment fruitful.

Held further, following *Reg.* (*Co. Dublin County Council*) v. *New Kilmainham Urban District Council* (*infra*, p. 495), that the defendants were not entitled to participate in the 5 per cent. deduction for cost of collection, &c., allowed by section 66, sub-section 4.

MOTION on behalf of the plaintiffs to vary the judgment given on the 21st June, 1901, in this action, which was tried on the 26th April, 1901, by Mr. Justice Andrews without a jury.

The following statement is taken from the report of the learned Judge who tried the case:

The action was brought to recover £99 13*s.* 6*d.*, the unpaid balance of £16,170 2*s.* 8*d.*, claimed by the plaintiffs under a written demand, dated the 5th October, 1899, as payable to them

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and MADDEN, JJ.

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by the defendants as the defendants' apportioned share of the amount required by the plaintiffs to meet the estimated expenditure of the financial year ended the 31st March, 1900.

The said demand of the 5th October, 1899, comprised the following two items, viz. £253 13*s.* 5*d.* as the apportioned share of the defendants' liability in respect of the charges on the bridges area for the half-year ending the 31st March, 1900, and £1739 11*s.* 7*d.* as the apportioned share of the defendants' liability in respect of metropolitan police for the same half-year.

The £99 13*s.* 6*d.* sued for (being 5 per cent. on £1993, the amount of the above two items) was claimed by the defendants (*a*) as and for the cost of collection and irrecoverable rates and office expenses, under section 66, sub-sect. 4, of the Act of 1898; and (*b*), by an amended defence, they pleaded that the £99 13*s.* 6*d.* sued for was the balance of the police and bridge taxes payable under sect. 66 by the plaintiffs, and by the plaintiffs apportioned under sect. 51 upon the defendants; that the defendants, in compliance with such apportionment had levied rates in the whole of their district to the full extent authorized for these purposes, and before action brought had paid to the plaintiffs the full amount raised, less only the necessary costs of collection; that any sums they had failed to raise were irrecoverable; that the amount of such costs, and of such irrecoverable sums about made up the said £99 13*s.* 6*d.*; and that this amount was less than 5 per cent. on the amount of the plaintiffs' demand.

Mr. Campbell, K.C., for the plaintiffs, referred to and relied on the following enactments:—

Section 51, sub-section 2, of the Local Government (Ireland) Act, 1898, which provides for the apportionment by the county council of the amounts to be raised for county at large and union charges between any urban district in the county or union, and the rest of the county or union, in proportion to rateable value, and that the amount apportioned to an urban district and any urban charge leviable off that district shall be paid by the council of that district to the county council upon the prescribed demand.

Section 66 of the same Act (relating to Dublin, the provisions of which apply to the poor rate, police rate, bridge tax, and bridge rate), sub-sect. 2, directing that the Commissioner of Police,

under the Dublin Metropolitan Police Acts, shall, at the time therein mentioned, estimate the amount necessary for the maintenance of the police force and the purposes of the said Acts during that financial year, not exceeding what he is under those Acts entitled to raise by a rate thereunder.

Sub-section 3, directing that the Dublin Port and Docks Board shall, at the time therein mentioned, estimate the amount required in that financial year for the bridge tax (if any) and the bridge rate.

Sub-sect. 4, directing that the Commissioner and Board, respectively, shall apportion each amount between the city of Dublin and the rest of the police district of Dublin metropolis or of the bridge area (as the case may be) which is outside the city of Dublin, according to rateable value, and shall send to the council for the city a demand for the amount apportioned to it, and to the council of the county of Dublin a demand for the amount apportioned to the rest of the police district or bridge area, and that each council shall pay, by equal half-yearly payments, the amount specified in such demand, "less 5 per cent., as and for the cost of collection and irrecoverable rates and office expenses," and also less such other sum (if any) as therein mentioned.

Sub-section 6, directing that a sum equal to each of the amounts specified in such demand on the county council of the county of Dublin shall be raised, as provided by this Act with respect to a railway or harbour charge; but that a council may raise it, if they think fit, by levying a separate rate.

Section 57, sub-section 2, which provides that the amount required for a railway or harbour charge shall be separately estimated and raised by means of the poor rate.

Mr. Campbell, K.C., said that, as he understood, the sole question between the parties was, in substance, whether the 5 per cent. mentioned in section 66, sub-section 4, on the above items for bridge rate and police rate, which amounted to the sum of £99 13*s.* 6*d.* sued for, and which the defendants had not paid to the plaintiffs, was a deduction to which the defendants were entitled, and he contended that, by the express terms of section 66, sub-section 4, the plaintiffs, and they only, were entitled to it. He referred, in support of this contention, to

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the recent case of *Reg.* (*County Dublin County Council*) v. *New Kilmainham Urban District Council* (1).

Mr. C. O'Connor, K.C., for the defendants, referred to the amended defence, and said that the amount sued for was, in substance, claimed by the defendants as a deduction for (*a*) irrecoverable bridge tax and police rate, and (*b*) the cost of the collection of those rates. He contended that the 51st and 66th sections of the Act of 1898 showed that the defendants were collectors only for the plaintiffs of the shares of those rates apportioned on the defendants' district, and that the plaintiffs were not entitled to get more from the defendants (their collectors) than they could get if they were the collectors themselves; that the limit of the police rate was eightpence in the £; that with respect to it the defendants had rated up to their limit, and had no fund out of which they could pay the amount of the irrecoverable rates; and that there could not be a legal liability on them to pay what they had not the means to discharge.

He admitted that this question could not arise with reference to poor rate, which was not limited, but submitted that the deficiency could not be thrown on the poor rate.

He referred to section 46 of the Pembroke Township Act, 1863, which limited the township rate to 2*s.* in the £ in any year, unless with such ratepayers' consent as therein mentioned, but so that in no case could it exceed 2*s.* 6*d.* in the £. He submitted that no part of this rate could be applied for either bridge tax or police tax; that this rate was applicable to union charges; and that the defendants had no fund out of which this balance of their proportion of bridge tax and police rate could be paid, or rate by which such deficiency could be raised. He referred to the Act 1 Vict. c. 25, s. 4, under the authority of which the Dublin metropolitan police rate was raised and levied, and which limited that rate to 8*d.* in the £ on the annual value of the rateable property. Up to 1898 (he said) the police rate was collected over the whole metropolitan police district by the Collector-General of Rates: 12 & 13 Vict. c. 91, sect. 30 (Collector-General to applot and collect), and sect. 62

(1) *Infra*, p. 495; 1 New Ir. Jur. 59.

(unoccupied and empty premises, exempt while unoccupied). As to the bridge tax (he said) it was to be applotted and levied in the same way as the police rate: 17 Vict. c. 22, s. 6.

The learned Judge said that he was not referred to any enactment limiting the bridge tax, of which the defendants' proportion was £253 13*s.* 5*d.*

Counsel for the defendants further referred to the County Councils Order of 18th April, 1899, Article 22, sub-clause 6, which he submitted showed that the plaintiffs were only entitled to get sufficient to meet liabilities and not a surplus sum of 5 per cent., as to which he asked how were they to apply it.

He then proceeded to give the following items, which (in case the defendants were not to be held entitled to retain £99 13*s.* 6*d.* as 5 per cent. on the amount of the police rate and bridge tax), he submitted showed the actual amount they were entitled to retain viz.—£38 0*s.* 5*d.*, which represented the amount of the police rate and bridge tax on unoccupied houses, and was irrecoverable—£5 9*s.* 2*d.*, which represented the amount of loss of police rate and bridge tax by reason (as he said) of their not being leviable on the half-rents of certain premises: 17 Vict. c. 8, s. 2—£3 3*s.* 1*d.*, which represented the amount of loss of police rate and bridge tax assessed on houses which before collection were pulled down, and was irrecoverable—£32 10*s.*, which the defendants claimed as representing a collector's commission which would cover the expense of the collection of the police rate and bridge tax. Counsel, however, admitted that he could not in this way make up a sum equal to the £99 13*s.* 6*d.*

Mr. Healy, K.C., for the plaintiffs, as to the above item of £5 9*s.* 2*d.*, referred to the cases of *Moylan* v. *The Dublin Port and Docks Board* (1), and *Moylan* v. *the Same* (2), as establishing that the police tax and the bridge tax were leviable without any such exemptions as counsel for the defendants claimed allowance for. He then referred to the Dublin Corporation Act of 1890, 53 & 54 Vict. c. 246 (local), and the changes it made in the collection of rates, leaving the Collector-General still to collect the poor rate; and he submitted that the 5 per cent. deduction referred to in

(1) Ir. R. 6 C. L. 299. (2) Ir. R. 9 C. L. 457.

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section 66, sub-sect. 4, of the Act of 1898 was reasonable, and went in ease of the Dublin ratepayers. He admitted that the Act of 1898 had not expressly provided for the expense of collection in those areas in the county of Dublin outside the city in which the county council was not the collector, of which the Pembroke township was one, but contended that section 51, sub-sect. 2 of the Act of 1898 was precise and obligatory; that the Commissioner of Police must make his estimate on the limit of eightpence in the £; but that the only bodies who could challenge his estimate were the city and the county, and that, when once the share of the defendants was apportioned on their district, they must raise it irrespective of any question of limit, and pay it to the plaintiffs on the prescribed demand by reason of the obligation imposed on them by section 51, sub-sect. 2. He argued that sub-section 7 of section 66 gave the defendants the power to make, levy, and collect the police rate and bridge tax upon the same basis, and in the like manner, as the poor rate (1), and submitted that the irrecoverable rates should be estimated and a rate struck which would make the amount required to be raised.

His Lordship stated that to facilitate the final decision of all questions in the action he had prepared his report before giving judgment, and had shown it to counsel on both sides in order that all necessary admissions of fact might be made, and so that such final decision could be obtained upon his report. His Lordship found for the plaintiffs, and gave judgment for them on foot of their claim, with costs, for £58 10*s.* (being the balance of the sum of £99 13*s.* 6*d.* sued for, less by the above-mentioned irrecoverable sums of £38 0*s.* 5*d.* and £3 3*s.* 1*d.* together amounting to £41 3*s.* 6*d.*); and his Lordship found against the defendants on their set-off, leaving the plaintiffs to move to increase the judgment by such further sum as they might be advised to claim over and above the £58 10*s*, and leaving the defendants also to move as they might be advised.

The plaintiffs now moved for an order that so much of the judgment of the Right Honourable Mr. Justice Andrews of the 21st

(1) See section 55, sub-section 3.

June, 1901, as declared the defendants entitled to deduct from the sum of £99 13*s.* 6*d.* sued for in this action the sums of £38 0*s.* 5*d.* and £3 3*s.* 1*d.* (making together the sum of £41 3*s.* 6*d.*), be reversed, and that the plaintiffs be declared entitled to judgment for the said sum of £41 3*s.* 6*d.* on the ground that the Judge was wrong in point of law in declaring the defendants entitled to the said deductions, and that in point of law the defendants were not entitled to any deductions in respect of irrecoverable rates.

The Solicitor-General (*J. H. Campbell, K.C.*), *T. M. Healy, K.C.*, and *J. J. Clancy*, for the plaintiffs.

C. O'Connor, K.C., *Blood, K.C.*, and *Jefferson*, for the defendants.

[Counsel referred during the argument to the following cases:—*Moylan* v. *Dublin Port and Docks Board* (1); *Pallister* v. *Mayor of Gravesend* (2); *Payne* v. *Brecon Corporation* (3); *Bush* v. *Martin* (4).]

Cur. adv. vult.

Dec. 14.

The judgment of the Court was delivered by—

GIBSON, J.:—

In this action, brought to recover £99 13*s.* 6*d.*, a balance of a demand for £16,170 2*s.* 8*d.*, dated the 5th October, 1899, pursuant to the Local Government (Ireland) Act, 1898, section 51, the defendants at the trial relied on two defences:—one, that they were entitled to participate in the five per cent. allowance given by section 66, sub.-sect. 4; the other that they were not liable for two sums (£38 0*s.* 5*d.* and £3 3*s.* 1*d.*, representing irrecoverable sums for bridge rate and police tax) on premises within the township which were unoccupied. The former defence was overruled by the learned Judge on the authority of the *New Kilmainham District Council Case* (5). His decision has not been challenged by the defendants; and the only question, therefore, before us relates to the above sums of £38 0*s.* 5*d.* and £3 3*s.* 1*d.*, as to which the Judge gave a decision adverse to the plaintiffs.

(1) Ir. R. 6 C. L. 299.
(2) 9 C. B. 774.
(3) 3 H. & N. 572.
(4) 2 Exch. 311.
(5) *Infra*, p. 495.

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These two sums represent an uncollected and irrecoverable balance in respect of £253 13*s.* 5*d.* apportioned on the defendants in respect of bridge tax, and of £1739 11*s.* 7*d.* apportioned on the defendants in respect of police charges, as shown in the said written demand of October 5th, 1899. There is no limit of amount as to bridge rating; but the police charge is restricted to a maximum of 8*d.* in the £ on the valuation. The proportion of the deficiency to be attributed to the bridge rate and police rate respectively is not ascertained by the learned Judge, but it is apparently determined by a calculation in reference to the proportions of the two charges of £253 13*s.* 5*d.* and £1739 11*s.* 7*d.*

For the plaintiffs, the *Solicitor-General* confined his argument to the contention that sect. 51 imposed on the defendants an unqualified obligation to pay the demand, which obligation could be enforced by action, irrespective of the capacity of the defendants to pay and of the power of the plaintiffs to make their judgment fruitful.

Mr. O'Connor, for the defendants, on the other hand, argued that the defendants were only made agents to collect the rates, and that, if the charge was not properly leviable before the Act by reason of limitation of rating power or otherwise, the statute did not make the defendants liable, as it could not be supposed that a nugatory obligation was created which could not be lawfully discharged.

Section 51, as between districts and the county, seems to convert the previous individual liability of ratepayers into a species of aggregate or corporate liability. Sub-sect. 1 compels the county council, upon the prescribed demand, to supply the money required to meet the expenses of the local body. Sub-sect. 2 commands the county council to apportion, in proportion to rateable value, every amount to be raised partly off any urban and partly off any rural district in the county; and any amount so apportioned to an urban district shall be paid by the council of that district to the county council upon the prescribed demand. What is the exact scope of the words in the sub-section: "and also any urban charge leviable off an urban district," was not satisfactorily explained by counsel, and I need not consider it, as the demand in the present case represents an apportioned amount

within the earlier part of the sub-section. The County Councils Order, 18th April, 1899, Art. 22, contains further provisions as to this demand, and the duty to pay it, which I do not discuss, my opinion being based on the statute. The apportionment is to be made on *valuation*, and the county are not at liberty in making this demand to introduce a speculative deduction on account of some of the premises included in the valuation being or becoming not rateable by reason of non-occupation. Valuation is the basis of calculation. I may point out that unoccupied premises during the currency of a rate may become rateable if they find an occupier. The demand here is admittedly regular and *intra vires*. How can the statutory duty be defeated by matter subsequent?

The plaintiffs' view derives strong support from section 66, sub-sections 2, 3, and 4. The Commissioner of Police is to make an estimate not exceeding the amount which, under the Dublin Metropolitan Police Acts, he is entitled to raise by a rate. This estimate could not apparently exceed in the aggregate 8*d*. in the £ on the valuation. It is not alleged that the estimate did exceed that limit. The Dublin Port and Docks Board are similarly required to make an estimate for bridge tax and bridge rate—as to this there is no limit of rating power. Under sub-section 4 these two estimates are to be apportioned between the city and the county of Dublin; demands are to be sent for the respective amounts so apportioned; and each council "shall pay by equal half-yearly payments the amount specified in such demand, less 5 per cent. as and for" (amongst others) "the cost of collection and irrecoverable rates and office expenses." Under this sub-section there is a clear obligation to pay imposed on the councils, and the express allowance for irrecoverable rates decisively shows that the item cannot be deducted from the apportioned demand under section 51. It would appear just that the urban district contributory should participate in the five per cent. allowance; but the *Kilmainham Case* (1) decides otherwise, and we are bound by that decision.

In reply, *Mr. Healy* strongly pressed an argument which, not opened by the Solicitor-General, must some time be considered

(1) *Infra*, p. 495.

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and disposed of. The argument is this: the collective responsibility of the urban district measured by aggregate valuation is substituted for individual liability; the apportioned amount of the estimates under section 66, sub-sect. 4, as a corporate debt becomes poor rate to be levied under section 28; and the ratepayers must make good deficiencies from irrecoverable rates.

Mr. O'Connor, on the other hand, while admitting that the apportioned amount is in a sense and for the purpose of collection poor rate, argues that bridge rate and police tax preserve their identity as distinct charges dedicated to special objects and subject to previously existing limitations; that the new poor rate can and must be resolved into its component parts; and that no ratepayer can be compelled to pay in respect of police tax more than 8*d.* in the £ on his valuation. I think that his argument applies only to police tax, and that it does not extend to the proportion of irrecoverable rates attributable to bridge rate, as to which there is no limit.

This question will more properly arise for decision if and when a mandamus is applied for to enforce the judgment, and incapacity to rate is relied on as an answer to such application: Shortt on Mandamus, pp. 246-7; *Donohoe's Case* (1). In the view that I take it would be premature to decide it now, as, even if payment cannot ultimately be compelled, the plaintiffs' right to judgment is not affected. Inability to pay is not available as a defence by a corporation, either in contract or tort, where the matter founding the action is *intra vires* and lawful. Here there is a statutory obligation creating a debt.

The judgment below must be varied by extending it to the entire sum sued for, £99 13*s.* 6*d.*

Solicitor for plaintiffs: *Wm. J. Shannon.*
Solicitors for defendants: *D. & T. Fitz Gerald.*

A. E. R. J.

(1) 30 L. R. Ir. 329.

REG. (COUNTY DUBLIN COUNTY COUNCIL) *v.* NEW KILMAINHAM URBAN DISTRICT COUNCIL (1).

Q. B. Div. 1900. Dec. 7, 11.

Local Government (Ireland) Act, 1898, *sects.* 51, 66—*Contribution between district council and county council—Time of payment—Deduction for cost of collection and irrecoverable rates—Local Government Board (County Councils) Order of 18th April*, 1899, *Article* 22.

Under sections 51 and 66 of the Local Government (Ireland) Act, 1898, the 5 per cent. deduction for cost of collection and irrecoverable rates must, in the accounts between the county council and its contributory district councils, be credited to the former.

The Court will decline to enter upon the question of the legality of a demand note duly served in pursuance of the Local Government Board (County Councils) Order of the 18th April, 1899, or to discuss the validity of that Order, upon a motion to make absolute or discharge a conditional order for the issue of a writ of mandamus; and would require such a question, if raised, to be raised by plea upon the return to the writ of mandamus, or upon writ of certiorari.

MANDAMUS.

This was an application to make absolute, notwithstanding cause shown, a conditional order dated the 1st day of November, 1900, whereby it was ordered "that a writ of mandamus do issue directed to the Munster and Leinster Bank (Limited), being the treasurer of the said New Kilmainham Urban District Council, commanding that they, the said Munster and Leinster Bank (Limited), do out of such moneys as are under their control as such treasurer, or should these moneys be insufficient, then out of the first moneys coming under their control as such treasurer, forthwith pay to the treasurer of the county council of the county of Dublin, the sum of £1634 16*s.*, being the amount of three quarterly instalments now due and payable by the said urban district council under the apportionment and demand of the county council for the financial year ending 31st March, 1901."

The county council had, on 3rd April, 1900, sent in to the

(1) Before PALLES, C.B., and ANDREWS and JOHNSON, JJ.

Q. B. Div. 1900.

DUBLIN C. C. v. KILMAINHAM U. D. C.

respondents, the New Kilmainham Urban District Council, their annual estimate and demand note claiming a payment of £2179 14*s.* 7*d.*, as the contribution of the urban district for the financial year commencing 1st April, 1900, towards county at large charges. No part of this sum had been as yet paid, and the county council now sought by mandamus to enforce payment of three quarterly instalments of this amount. By the Local Government Board Order of July 7, 1899 (Article 2), the county council were bound to pay the annual county at large charges in advance, and in the present instance had been obliged to raise money from other sources to defray such charges.

J. H. Campbell, Q.C. (*J. J. Clancy* with him), for the county council.

Serjeant Dodd and *O'Mahony* (*Steen* with them), for the Kilmainham Urban District Council, contended that the annual contribution was payable by quarterly instalments at the end of each quarter, and that the urban district could not legally be obliged to pay in advance at a time when no rate was in existence. They also argued that the district council was entitled to the benefit of the 5 per cent. deduction to be made in respect of costs of collection and irrecoverable rates within ss. 51 and 66.

Clancy, in replying, stated that he had ascertained that the county council had not charged any portion of the percentage (5 per cent.) paid to the rate-collectors, against the district council, in respect of the apportioned poor rate leviable in their district.

He also stated that if the respondent council forthwith paid two of the instalments due the applicants would not press for immediate payment of the third. What the applicants did press for was that these payments should be made at the beginning, not at the end, of each quarter by the various district councils within the county.

Dec. 11.

PALLES, C.B.:—

The points which we have to decide seem to be quite clear. We have not to determine the legality of the rule or order of the Local Government Board, which prescribes as the time for

payment of the first instalment the first meeting of the council in the financial year, which is a time at which it is impossible that any rate can be payable to the urban council for the financial year in respect of which the county council seeks the payments in question here (1). I agree with Serjeant Dodd that that question is too important to be decided upon a *motion* for mandamus. If it is to be decided, it must be upon plea to the return to the writ, or, better still, upon *certiorari* to the Local Government Board. For the purpose of our present decision we assume that the order defining these times for payment is legal.

The first question, then, is the 5 per cent. upon the amount of the apportionment upon the New Kilmainham district for the metropolitan police rate and the bridges rate (2). I should be glad to decide, and if I had the power, I should decide that the district council were entitled to the benefit of the 5 per cent., inasmuch as they did the work. But, taking together sections 51 and 66, they are too strong for me. Section 66 directs that the amount mentioned in the demand shall be raised and paid over, either to the police authority or to the bridges authority the county council first deducting 5 per cent. "as and for the cost of collection and irrecoverable rates and office expenses"; and section 51 enacts that the amount to be apportioned, *i.e.* the amount of which the urban district council is to pay a proportion, is not the net sum, but the sum to be raised; and as the sum to be raised includes the 5 per cent., I must hold that the county council gets the benefit of it.

The next point is in reference to the bridges tax and the metropolitan police tax. The district council insist that portion of the sums claimed was not due upon the 1st November, when the application for the mandamus was made. The answer to this is that the liability depends upon the demand authorized by the Local Government Board; and that that demand directs the payment of these two sums to be in four quarterly payments, at times which, as to three of such payments, had elapsed before the conditional order.

(1) Local Government Board (County Councils) Order of 18th April, 1899, Article 22 (Vanston, p. 502).

(2) Local Government Act, 1898, sect. 66.

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DUBLIN C. C. v. KILMAINHAM U. D. C.

Palles, C.B.

Nothing then remains but the question of the fund against which our order should go. Should it be the entire fund or that part only of it which represents poor rate? It has, however, been arranged, as I understand, between the parties that we are not to decide this question at present. It is possible that its decision might involve a consideration of the funds which before the Act were liable to the metropolitan police tax and the bridges tax.

We disallow the cause shown, without prejudice to the Court considering hereafter, if it shall be applied to so to do, whether the fund out of which the treasurer is directed to pay is to be limited to any particular part or class of the district council's funds; and, the district council undertaking within a week to pay to the county council the two quarterly instalments which became due upon the 1st April and the 1st July, we direct that the mandamus shall not issue until further order; and that the treasurer, notwithstanding this order, and the order of the 1st November, shall be at liberty to deal with the funds under his control as if these orders had not been made.

The district council must pay the costs.

ANDREWS and JOHNSON, JJ., concurred.

Clancy asked that the order should state that it was "by consent."

PALLES, C.B., directed that the words "by consent" should be introduced into the order after the "without prejudice" clause.

Solicitor for county council: *W. J. Shannon.*
Solicitor for respondents: *C. P. O'Neill.*

A. E. R. J.

IN THE GOODS OF GEORGE BOLTON COLCLOUGH (1).

K. B. Div. Probate. 1901. Nov. 18, 25.

Practice—Administrator out of jurisdiction—Revocation of grant—Administration de bonis non — 38 *Geo.* 3, *c.* 87; 20 *&* 21 *Vict. c.* 79, *s.* 79; 22 *&* 23 *Vict. c.* 31, *s.* 14.

The power of the Court to make a grant of administration *de bonis non* in the absence of the administrator out of the jurisdiction is not limited to the jurisdiction conferred by 38 Geo. 3, c. 87, as extended to Ireland by 20 & 21 Vict. c. 79, s. 79, and 22 & 23 Vict. c. 31, s. 14, which jurisdiction apparently only authorizes a limited grant; but if the administrator cannot be found, or even if found, would not be a proper person to continue the administration, the Court has power to revoke the grant, and to make a fresh grant.

An intestate died, leaving eight children. His assets consisted of a farm held under a judicial tenancy, and some other personal estate. Administration was granted to one of his sons, who emigrated to Australia some years afterwards, without having administered the estate. The other children desired to have the farm sold, and the assets distributed. The address of the administrator in Australia was not known

The Court, upon the application of the children, revoked the grant, and made the usual order for administration *de bonis non* to one of them.

Goods of Loveday ([1900] P. 154) followed.

MOTION.

This was an application, on behalf of Henry Colclough, for an order that the grant of administration to the estate and effects of George Bolton Colclough granted to his son, George Bolton Colclough, be revoked, and that administration *de bonis non* to the said estate and effects be granted to the applicant.

George Bolton Colclough died intestate on the 25th February, 1890, a widower, leaving the following children him surviving, namely, Fanny Colclough, George Bolton Colclough, Sarah Usher (wife of James Usher), Ellen Colclough, Charles Colclough, James Colclough, Nannie Colclough, and Henry Colclough. The assets of the deceased consisted of a farm known as Barna, county

(1) Before ANDREWS, J.

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Kilkenny, containing 42 Irish acres, held under a judicial tenancy, at a rent of £23, farming-stock, and other personal estate. The gross value was sworn at £228 by his son, George Bolton Colclough, to whom administration was granted out of the Kilkenny District Registry. George Bolton Colclough, the administrator, took no steps at any time towards administering or distributing the residue of the personal estate of the deceased beyond some payments on foot of his debts, funeral, and administration expenses. On the 31st July, 1900, he emigrated from Ireland to Australia. He was still residing in that country, in the colony of Victoria, and had no intention of returning to or taking up his residence in Ireland, but his address in Victoria was not known. It was necessary to realise the assets for the purpose of division amongst the next-of-kin, and the application was made on their behalf. The grant was outstanding, and was stated to be in the hands of a solicitor.

Garrett W. Walker, in support of the application, referred to the following:—*In the Goods of Bradshaw* (1); *In the Goods of Covell* (2); *In the Goods of Loveday* (3); *In the Goods of Campion* (4); *In the Goods of Downing* (5); *In the Goods of John Colclough* (6); *In the Goods of Darcy* (7); Maxwell's Probate Practice, pp. 363, 397.

Nov. 25.

ANDREWS, J.:

I think I can make the order asked for, and direct the outstanding grant to be got in. The case is a peculiar one. The application is to revoke a grant of administration good in itself, and to give another grant *de bonis non* to a person in the same priority as the original administrator, namely, Henry Colclough, his brother, who could have got the grant if he had applied for it originally. Administration to George B. Colclough was granted on March 25th, 1890. In July, 1900, the administrator thereby appointed left this country, and went to Australia, and is believed to be living somewhere in Victoria, but his

(1) 13 P. D. 18.
(2) 15 P. D. 8.
(3) [1900] P. 154.
(4) [1900] P. 13.
(5) 19 L. R. Ir. 233.
(6) 19 L. R. Ir. 235.
(7) 25 I. L. T. R. 65.

address is not known. If he did anything to administer, it was only to pay some debts and liabilities, and to that extent only has there been any administration of the estate. It occurred to me that advantage might be taken of the provisions of 38 George 3, c. 87, which was applied to Ireland by 20 & 21 Vict. c. 79, s. 79, and extended to administrators. That Act, which was passed in the year 1798, is entitled an Act for the administration of assets in cases where the executor to whom probate has been granted is out of the realm. The preamble recites that the laws now existing are not sufficient to enforce a speedy distribution of the assets of deceased persons, where the executor to whom probate of the will hath been granted is out of the jurisdiction of His Majesty's Courts of Law and Equity, and then it enacts that at the expiration of twelve calendar months from the death of any testator, if the executors or executor to whom probate of the will shall have been granted, are or is then residing out of the jurisdiction of His Majesty's Courts of Law and Equity, it shall be lawful for the Ecclesiastical Court which granted probate of such will, upon the application of any creditor, next-of-kin, or legatee, grounded on the affidavit thereinafter mentioned, to grant such special administration as thereinafter is also mentioned. The form of affidavit and of administration is therein provided, and is limited for the purpose of a bill in equity for payment of the demand of the applicant out of the assets of the testator. The Irish Probate Act of 1857 (20 & 21 Vict. c. 79), s. 79, extended this Act to Ireland, and to the case of intestacy as well as probate, but it did not enlarge the grant authorized by the Act of George 3. The Irish Act of 1858 further extended this right, by directing that the Act of George 3 as amended should apply, whether proceedings in Chancery are intended to be instituted or not. It is not clear whether a general grant can be obtained under these enactments. The case of *The Goods of Darcy* (1) shows that the late Judge Warren doubted whether a general grant could be given, and he only gave a limited grant in that case. I think there is much doubt as to the power to give a general grant under these Acts in a case of

(1) 25 I. L. T. R. 65

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Andrews, J.

this kind. There is, however, a mode by which it may be done apart from these Acts. Mr. Walker referred to the case of *In the Goods of William Loveday* (1). That case shows that the Court, as part of its original jurisdiction, has power to make requisite provision that the estate of an intestate shall be administered by a proper administrator, and if the Court has intrusted the administration of the estate to a person who undertook but has failed in the discharge of an administrator's duty, the Court has power to revoke the grant. Therefore, I think I can do what is asked here. Jeune, P., in that case said:—"After all, the real object which the Court must always keep in view is the due and proper administration of the estate, and the interest of the parties beneficially entitled thereto; and I can see no good reason why the Court should not take fresh action in regard to an estate where it is evident that its previous grant has turned out abortive or inefficient. If the Court has in certain circumstances made a grant in the belief and hope that the person appointed would properly and fitly administer the estate, and if it turns out that the person so appointed will not or cannot administer, I do not see why the Court should not revoke an operative grant and make a fresh grant. Therefore, I accede to the present application. I revoke the grant formerly made to the widow of the intestate, and I direct a fresh grant to issue in favour of James Loveday in respect of the personal estate and effects of the intestate left unadministered." The facts there were these. A man died intestate, leaving a widow and six children by a former marriage. The widow, who obtained administration in 1888, could not be found, and the six children desired that a grant *de bonis non* should be made to James Loveday, one of their number, in order to obtain payment of a sum of £173 8*s.* 9*d.*, payable under an order of the Chancery Division, made in 1899 to the personal representative of William Loveday. The widow had not administered, and things were at a deadlock. Here it may be that the administrator could not be found; but suppose I directed advertisements to be issued, and that he was found, he has made complete default in administering the estate, and if

(1) [1900] P. 154.

found in Australia, I would regard him now as a very undesirable person to discharge the duties of administering the estate. I have drawn up a special order, as a similar order has not been made in this Court. The order was as follows:—

"It appearing to the Court that George B. Colclough, to whom letters of administration of the personal estate of his father, George B. Colclough, deceased, were granted forth of the District Registry at Kilkenny, on 24th March, 1890, is resident in some place in Australia, out of the jurisdiction of the Court, without any intention of returning to Ireland, and that his address is unknown, and that he left Ireland on 31st July, 1900, and has since remained out of the jurisdiction of the Court, without having fully administered the personal estate of the said deceased, which, or the greater part of which, remains unadministered, and that the interests of the persons beneficially entitled thereto, require that the same should be administered without further delay, it is therefore ordered and decreed by the Court that the said letters of administration be, and the same are hereby, revoked; and it is further ordered that Henry Colclough, as a lawful son and one of the next-of-kin of the said George Bolton Colclough, be at liberty to apply for a grant of administration of the personal estate and effects of the said deceased left unadministered by his said son George Bolton Colclough, as aforesaid, and that the said Henry Colclough be entitled to his costs of this application, and of the said grant to him when he shall have extracted the same."

Solicitors for the applicant: *T. & H. Turpin.*

W. L.

K. B. Div.
1902.
Jan. 15, 23.
Appeal.
May 2, 9.

BECKLEY *v.* SCOTT & CO. (1).

(1900. No. 15,741.)

Employer and workman—Compensation—Unsuccessful proceedings under the Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37)—*Right to institute subsequent proceedings independently of the Act.*

When a workman has proceeded to have compensation for his injuries assessed under the Workmen's Compensation Act, 1897, and is defeated by reason of a ruling that his case does not come within the provisions of the Act, he is not thereby prevented from instituting subsequent proceedings independently of the Act, to enforce any previously existing remedy to which he may have been entitled (Boyd, J., *diss.*).

In September, 1900, the plaintiff instituted proceedings in the Recorder's Court for compensation, under the Workmen's Compensation Act, for injuries sustained on the 4th August, 1900. On the 18th October, 1900, the Recorder dismissed the application on the ground that the plaintiff, not having been employed for at least two weeks, was not within the Workmen's Compensation Act on the authority of two decisions of the Court of Appeal in England. These decisions were overruled by the House of Lords on the 14th December, 1900. The plaintiff brought an action for damages for negligence in the Superior Courts with respect to the same injuries as were the subject of the proceedings in the Recorder's Court:—

Held, by the King's Bench Division (Boyd, J., *diss.*), that the proceedings in the Recorder's Court were no bar to the action in the Superior Court:—

Affirmed by the Court of Appeal (Fitz Gibbon and Walker, L.JJ.; *diss.* Holmes, L.J.).

MOTION by the plaintiff to set aside verdict and judgment entered for the defendants and for a new trial. The action was by John Beckley, a minor, suing by Mary Beckley, his mother and next friend, against his employers, Thomas Scott & Co., for damages in respect of permanent personal injuries sustained by him while working on the 4th August, 1900, at dangerous sawing machinery

(1) Before GIBSON, BOYD, BARTON, and WRIGHT, JJ.

in the course of his employment in defendants' establishment. The plaintiff had previously taken proceedings under the Workmen's Compensation Act, 1897, before the Recorder of Dublin, and it appeared from the notice or request for arbitration that at the date of the accident he had been only one week in the employment of the defendants. At the date of the hearing before the Recorder, viz. on October 18, 1900, the law was settled by the case of *Lysons* v. *Knowles* (1) to be that in order to obtain the benefit of the Workmen's Compensation Act, 1897, the workman must have been for at least two weeks in the employment of the employer in whose services he had sustained the injuries. This decision was subsequently followed in the case of *Stuart* v. *Nixon* (2), and the learned Recorder, acting on this view of the law, decided that the plaintiff was not within the Workmen's Compensation Act, and dismissed the application. The plaintiff did not appeal from the Recorder's decision. Subsequently these two cases went to the House of Lords, where it was decided (3) that the right to compensation was not restricted by the schedule to employments by the week, or for weekly wages, or for two weeks at least.

The plaintiff then brought an action in the Superior Courts for damages for negligence on the part of his employers. The action was tried before Mr. Justice Johnson and a jury on November 23, 1901. The learned Judge held that as the plaintiff had exercised his option as between the two remedies open to him by instituting proceedings under the Workmen's Compensation Act, 1897, in respect of the injuries complained of in the statement of claim, he was debarred by sect. 1, sub-sect. 2 (*b*) of the Act from maintaining this action. He accordingly directed verdict and judgment to be entered for the defendants.

Ennis, for the plaintiff, in support of the motion.

Gordon, *K.C.*, and *R. C. K. Wilson*, for the defendants, referred to *Edwards* v. *Godfrey* (4).

(1) [1900] 1 Q. B. 780.
(2) [1900] 2 Q. B. 95.
(3) [1901] App. Cas. 79.
(4) [1899] 2 Q. B. 333.

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WRIGHT, J. :—

This case raises an interesting and important question under the Workmen's Compensation Act, 1897. It comes before the Court in a peculiar way. The plaintiff was a workman, and alleged that he came within the provisions of the Workmen's Compensation Act in respect of injuries sustained on the 4th August, 1900. He proceeded by notice and request for arbitration on the 12th October, 1900, which came before the learned Recorder on the 18th October, 1900. The learned Recorder dismissed the case, or rather refused the claim for compensation, on the grounds stated by him in his order, viz.: "And it appearing to the Court that the applicant was not sufficiently long in the said respondents' employment under the above mentioned Act, the Court refused the application without costs." The notice or request for arbitration itself stated that the claimant was only one week in the employment of the respondents, and at the time in August when the accident occurred, and in October when the case came before the Recorder, the law had been settled adversely to the claimant, viz. by the decision in the case of *Lysons* v. *Knowles* (1). The ground of the decision is given at p. 785. It was decided in June, 1900, and it was followed in the case of *Stuart* v. *Nixon* (2), which was reported in the month of July of the same year, and the head note of that case is this—"The dependants of a workman whose death has been caused by an accident arising out of, and in the course of his employment, are not entitled to compensation under the Workmen's Compensation Act, 1897, unless the workman at the time of the accident has been for at least two weeks in the employment of the employer."

The case decided the previous month was a decision of the same Court, and was, of course, followed by that Court. So that the law was fixed and settled by the Court of Appeal in England, and binding on the Recorder, who followed it, and refused the request for arbitration, holding that the workman was not within the Act. Subsequently these decisions were reversed by

(1) [1900] 1 Q. B. 780. (2) [1900] 2 Q. B. 95.

the House of Lords (1). This is a common law action for damages for negligence, and the defence—and the only defence relied upon—is a defence carefully prepared under section 1, sub-section 2, of the Workmen's Compensation Act, that the plaintiff had exercised his option—not in any sense *res judicata* —by taking proceedings under that Act, and that they had gone adversely to the workman. The latter allegation is true in fact, but I do not regard it as material to the defence. The plaintiff has replied joining issue, and also raising the question of law that this defence is no answer to the action.

The real question in the case accordingly is this, whether under section 1, sub-sect. 2, all that is given to a person under the Act is an option, and if he exercises that option is he barred from all other remedy.

There are two or three sections in the Act which are material, and to which I will shortly call attention. The most material section is, of course, section 1, which has been read so often during the argument, and especially sub-section 2 (*b*). It is as follows:— "When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid." By the Act a great advantage was conferred on the workman, and it was intended at the same time to protect to a certain extent the employer by not rendering him liable, according to the view the Court may take, either to pay compensation twice over or to a double set of proceedings. The effect of the section has been discussed in the Court

(1) [1901] App. Cas. 79.

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of Appeal in England in the case of *Edwards* v. *Godfrey* (1), and in that case it was argued, as was argued here by Mr. Ennis, for the workman, at page 336, "the object of the sub-section was in cases of negligence to preserve to the workman his existing civil remedies, with the qualification that the employer is not to be liable to pay compensation both under and independently of the Act; there is nothing in the sub-section, either express or implied, to prevent the workman from having a double remedy in respect of the same injury, and from taking proceedings under the Act after failure of his proceedings independently of the Act, provided only that he does not get double compensation."

Lord Justice A. L. Smith, in giving the judgment of the Court, deals with that, and, deciding against the claimant in the case, says:—

"The respondent has availed himself of the right given him by that sub-section: he has exercised his option in favour of bringing a common law action, which has failed. Having been defeated in this action there would, but for the provisions of section 1, sub-sect. 4, have been an end of any claim by the respondent against the appellant in respect of the injury." And then he goes on to deal with the sub-section, and having regard to the sub-section and the remedy it was intended to give, the Lord Justice holds that the application under the Act could not be sustained. That was the *dictum* of the Lord Justice, but I do not think it was necessary for him to have gone to that length, because the very language of sub-section 4 was quite enough to support his decision.

The construction would have been simple if sub-section 2 (*b*) had stopped at the words "before the commencement of this Act," but the difficulty arises from the following words to which, if the defendants' contention be right, I have not been able to give any reasonable effect or meaning, viz. "the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act."

I think the meaning of the section is this—the employer is

(1) [1899] 2 Q. B. 333.

protected against paying compensation twice; the workman must not have two proceedings pending at the same time, and if he insists in violation of the Act in bringing proceedings under the Act, and an action outside the Act, the Court will interfere and stay one of the two. But under sub-section 4, if the workman bring an action, that is, resorts to his common law remedy, and brings it within six months, and if it is found that there is a defence to the action, and that the common law action is therefore unsustainable, then the Judge can dismiss the action, but can assess compensation under the Act, subject to this—that the workman shall indemnify the employer as to the costs occasioned by his pursuing a wrong remedy. The option is not final. Compensation is what is looked to, and I take it that the reason that there is not a corresponding section providing that when abortive proceedings have been taken under this Act they can be turned into an action is that the time allowed by the Act for bringing the claim for compensation is six months, which might and in many cases would have elapsed by the time that the action came on for trial, if the workman proceeded by action first, whereas if he proceeded first under the statute and failed, he would have the full period of six years for bringing his action.

I am of opinion that the intention of the Act of Parliament is clear, and is made plain by the words used in the latter part of sub-section 2 (*b*), namely, that compensation shall not be given twice over, and for these reasons I hold that the defence fails, and that the direction of the learned Judge at the trial should be set aside and a new trial ordered.

BARTON, J.:—

In my opinion the judgment, which was entered for the defendants at the trial, ought to be set aside, and this application for a new trial ought to be granted. The defendants' counsel have admitted that they cannot rest their case on the basis of estoppel or *res judicata*, because the same matters were not in issue in this action as were decided by the Recorder. The defendants' case is narrowed down to the contention that the mere making by a workman of an unsuccessful application for compensation for

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injuries under sect. 1, sub-sect. 2 (*b*) of the Workmen's Compensation Act has the effect of for ever relieving the employer of his civil liability in respect of those injuries, although they were caused by his employer's personal negligence. But the sub-section itself seems to me to enact the contrary in clear words, by declaring that nothing in the Act shall affect the employer's civil liability for injuries caused by his personal negligence. I find it difficult to see what practical meaning can be given to these words, if every abortive or unsuccessful application under the Act has the immediate effect of relieving the employer of his civil liability for personal negligence. Again, what meaning can be attached to the further words in the same sub-section which provide that the employer shall not be liable to pay compensation both independently of, and under the Act, unless both remedies may be open to the workman? The whole fabric of the argument for the defendants rests on some words in the judgment of A. L. Smith, L.J., in *Edwards* v. *Godfrey* (1). But the marginal note, which seems to me to represent quite accurately the point of that decision, marks very clearly the difference between that case and the present case. The Act in section 1, sub-section 4, prescribed a special procedure for a workman to follow if defeated in an action for damages, and the Court of Appeal in *Edwards* v. *Godfrey* (1) held that he must follow that procedure. Defendants' counsel argued before us that this is the converse case of *Edwards* v. *Godfrey* (1). But it is the converse case only up to a certain point, because the Act does not prescribe any special procedure for an unsuccessful applicant for compensation under the Act. But the Act protects him by declaring that nothing in the Act shall affect the employer's civil liability in respect of an injury caused by the employer's personal negligence. Accordingly, the basis of the decision in *Edwards* v. *Godfrey* (1) is absent in the present case, and the decision of the present case does not depend on the decision of *Edwards* v. *Godfrey* (1), but turns on different words in a different sub-section, which were not under the consideration of the Court of Appeal in that case.

There is another view of this case, as to which, if it had been

(1) [1899] 2 Q. B. 333.

necessary, I might have asked for further argument. In the plea, on which they obtained judgment at the trial, the defendants rely on the Recorder's decree, which was to the effect that the plaintiff is outside the purview of the Workmen's Compensation Act, and the Recorder's decree was put in evidence for the defendants at the trial. The defendants are entitled to rely on that decree. But, if the plaintiff is outside the purview of the Workmen's Compensation Act, how can he be said to have exercised an option under that Act? Can it be said that the Recorder's decree meant that he was outside the benefits of the Act, but that thereby he was by implication subjected by the Act to this serious disability? If the plaintiff is outside the Act, is he not outside it for all purposes, and can any of its provisions apply to him? However, as this view was not argued, I have not allowed it to enter into the grounds of my decision. I merely mention it as a point, in reference to which, if it had been necessary, I might have asked for further argument.

My judgment rests on the simple grounds that, on the true construction of the Act of Parliament, the plaintiff's abortive or unsuccessful application for compensation under the Workmen's Compensation Act did not, in my opinion, relieve the defendants of thier civil liability to an action for damages in respect of such injuries, if they were caused by thier personal negligence.

BOYD, J.:—

I am of opinion that the plaintiff cannot sustain his present action, and that the verdict entered for the defendants should stand, and this motion be refused with costs.

By sect. 1, sub-sect. 2, of the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), it is expressly provided that, under circumstances such as those in the present case, "the workman may, *at his option*, either claim compensation under this Act or take the same proceedings as were open to him before the commencement of this Act." The workman was thereby prevented from bringing actions in two different Courts against his employer, and was bound to elect which tribunal he would resort to. The plaintiff in the present case exercised his option by taking proceedings before the Recorder of Dublin under the Act of 1897.

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The Recorder decided against him on the decision of the Court of Appeal in the cases of *Lysons* v. *Knowles* (1) and *Stuart* v. *Nixon and Bruce* (2). No appeal was taken from the decision so pronounced by the Recorder, and consequently his decree became final and binding on the plaintiff. Subsequently the decisions I have referred to were pronounced by the House of Lords to be erroneous in *Lysons* v. *Knowles* (3). However hard the decision may be on the plaintiff, I do not see that we have any right to interfere with the effect of the decision of the Recorder, which is final in this case.

The Act of 1897 expressly gives the workman by sect. 1, sub-sect. 2 (*b*), the right, *at his option, either* to claim compensation under the Act *or* to take the same proceedings as were open to him before the commencement of the Act. It does not give him both remedies. No doubt the provision was intended to save the employer from the expense of double proceedings. I think this is shown by the provisions of sub-sect. 4. I think the provisions contained in sect. 6, which also gives the workman "his option" are analogous to those in sect. 1. sub-sect. 2 (*b*). Section 6 no doubt adds "but not against both." This precise expression is not contained in sect. 1, but I take it the expression "*but* the employer shall not be liable to pay compensation for injury," &c., "both independently of, and also under, this Act" has the same meaning and intention.

It is said that the governing words in sect. 1, sub-sect. 2, are those which provide that the employer shall not be liable to pay compensation both independently of, and also under, the Act. This construction of the section would, in my opinion, give no effect to the words "*at his option*, take proceedings *either* under the Act *or otherwise*." If such be the meaning of the section, it should have stated that the workman might take proceedings in both tribunals, but could only recover compensation in one. I think the concluding clause of the section confirms my opinion of the construction of the statute. The meaning of this clause appears to me to be that in making his option he must be guided by the

(1) [1900] 1 Q. B. 780. (2) [1900] 2 Q. B. 95.
(3) [1901] App. Cas. 79.

fact that unless he alleges personal negligence or wilful act of the employer, he must proceed under the Act. He did in this case exercise his option to proceed under the Act.

In the case of *Edwards* v. *Godfrey* (1) it has been expressly decided by the Court of Appeal that the option once exercised cannot be altered. On these grounds I concur in the judgment of Mr. Justice Johnson, and with him follow the decision of the Court of Appeal in *Edwards* v. *Godfrey* (1).

GIBSON, J.:—

The plaintiff, before the present action, brought a claim under the Workmen's Compensation Act, 1897, which, though apparently one to which the Act applied, was defeated on the ground (now decided to have been erroneous) that he was not long enough in the defendants' employment to entitle him to compensation. The question before us is whether by such abortive claim the plaintiff has forfeited his right of action. The decision entirely depends on the construction of the Act, which is described by Lord Davey in *Lysons' Case* (2) as extraordinarily ill-drawn.

In cases to which the Act applies (sect. 7) the workman may either claim under the Act or proceed by action for personal negligence or wilful act. The two forms of relief are essentially different, a claim being based on accident, an action on negligence; and they may be met by dissimilar defences. A claim might be defeated on grounds inapplicable to an action, and an action might be dismissed on defences which would be no answer to a claim. So far as relates to claims the statute bristles with technicality. The words "claim," "undertakers," "factory," "engineering work," "scaffolding," and "repair," have all been the subject of conflicting decisions; and numerous claims were rejected because these terms having been misconstrued and misapplied, sect. 7 was supposed to exclude such claims from the application of the Act. When Courts have so often erred, why should an unfortunate workman's venial transgression in misconstruing the Act entail total deprivation of his right of action? The hardship is all the greater where (as here) the Act actually did apply to the case, and

(1) [1899] 2 Q. B. 333. (2) [1901] A. C. 79.

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the claim was apparently rightly brought, but was wrongly dismissed on the mistaken ground that the claimant was outside the Act. This appears on the face of the decision itself.

Under sect. 1, sub-sect. 2 (*b*), the workman may either claim under the Act or sue independently of the Act. The sub-section does not in express terms prohibit (as sect. 6 does) the enforcement of the two remedies, nor does it provide that the choice of one remedy, if fruitless, is to bar the application of the other. The defendants, however, contend that the election once made necessarily excludes from the alternative relief. The argument, which was founded on election, not estoppel, is intelligible; an election once exercised is final, and there is no *locus pœnitentiæ* (*Jones* v. *Carter* (1)). Parliament, when conferring a boon on certain classes of workmen, was at liberty to impose any conditions that it saw fit.

On examination, however, serious difficulties present themselves. Take the following cases:—

1. A claim dismissed with costs for general want of jurisdiction;

2. A claim dismissed as not being within section 7 of the Act;

3. A claim discontinued or abandoned before hearing because it is found to be unsustainable;

4. A claim dismissed by reason of non-compliance with section 2.

In such instances (some of which I admit are not quite the same as the present case, which was apparently within the Act, sect. 7), will the resort to an incompetent, abortive, or fruitless remedy forfeit the right of action? According to the defendants it would have that effect. Yet why should a mistake of *forum* be attended with such serious punishment?

These difficulties affecting the defendants' construction of sub-sect. 2 (*b*) are enhanced by the provision in the sub-section that the employer shall not be liable to pay compensation both independently of and also under the Act. The expression is "liable to pay," not "liable to be sued." If election to proceed by

(1) 15 M. & W. 718.

one remedy necessarily and finally excludes the possibility of the other remedy afterwards, this provision against double compensation is redundant, and has no substantive operation. Provisions securing the employer against being harassed by concurrent proceedings and from payment of twofold compensation are natural and reasonable; but if it was intended to visit an abortive claim with forfeiture of the right of action, such intention should have been been clearly expressed, and not left to doubtful implication. For the above reasons, if sub-section 2 (*b*) was to be construed by itself, I should be unable to adopt the view that the institution of a claim under the Act without regard to its result necessarily precluded the claimant from afterwards bringing an action. The main object of the section was to give the workman his choice of remedies, and to secure the employer against double compensation. What the section contemplates is apparently a successful proceeding, and it does not—in express language at least—deal with the case of a claim failing.

The defendants, however, urge that sub-section 2 (*b*) cannot be interpreted by itself, and that their view of its meaning is established by sub-section 4. Under that sub-section an unsuccessful action brought within the time limited by section 2 may be treated by the Court as a claim, subject to deduction of the extra costs occasioned by such action. This provision, it has been decided, makes it impossible, apart from the sub-section, to institute a claim after the failure of an action, the workman being confined to the remedy here given. The absence of any analogous remedial enactment giving rights in case of an unsuccessful claim is not unfairly relied upon by the defendants. Perhaps, however, the introduction of sub-section 4 may be accounted for by the time limit to which, under section 2, a claim is subject. If an action could not be dealt with as a claim, it would be in most cases too late to institute a claim after the action had failed. No similar difficulty arises where the claim precedes the action; and as the costs of such defeated claim might have been regarded by the Legislature, when the Act passed, as trifling, and could in any case have been recovered or set off by counterclaim, it may have been deemed unnecessary to make any special provision for such a case.

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Section 6, which was not relied upon by counsel on either side, is a curious limitation of the workman's common law right of action. Where the injury is one for which a stranger may be liable, there is an option of proceeding either at law against such stranger or against the employer under the Act, but not against both—an express prohibition not occurring in sub-section 2 (*b*); and the employer, if obliged to pay compensation under the Act, is entitled to be indemnified by such stranger. The section appears only to apply where there is a claim; it does not affect the right of action against the employer or stranger at common law. The section, where it applies, prohibits concurrent proceedings; but does it mean that, on failure of a claim or action on any ground, the workman's right to compensation against the person who was not party to or bound by the proceeding is extinguished? The punishment for mistake of remedy would in such case be more severe than under sub-section 2 (*b*), as the provisions of sub-section 4 for turning an action into a claim do not apply to section 6; the stranger guilty of actionable wrong will be better off than the employer. It looks as if the enactment, like sub-section 2 (*b*), contemplated an effective proceeding resulting in the recovery of compensation. The section is hard to explain. It is said that as the stranger must indemnify the employer against a successful claim, the object was to protect the stranger from costs of abortive litigation; if after an action against a stranger, which was dismissed with costs, the workman could commence a claim under the Act, and recover against the employer, the stranger, who is obliged to make good the compensation awarded, would not be able to get credit against such compensation for the costs of the action in which he had succeeded. The explanation fails; a stranger could not be liable for mere accident; and the explanation could not apply where the claim precedes the action. The section prohibits concurrent proceedings by action and claim, but it does not expressly attach to the failure of a proceeding against one person incapacity to proceed against another, when such failure might be on grounds irrelevant as a defence to such second proceeding. I do not think that such a startling, novel, and unreasonable intention can be implied.

To return to sub-section 2 (*b*). The defendants say that their

view as to the election under it being exclusive is established by authority. In *Edwards* v. *Godfrey* (1), which is the case relied on, the action preceded the claim, and the decision was founded on sub-section 4. The case is not therefore a direct authority, but there is a *dictum* of Lord Justice Smith that the defeat of the action, but for the provisions of sub-section 4, would have put an end to any claim. It is forcibly argued for the defendants that if an unsuccessful action, apart from sub-section 4, is a bar to any subsequent claim, an unsuccessful claim must equally be an answer to a subsequent action. Before considering the application and force of the *dictum* it is well to inquire what the Lord Justice meant. In other reports of the case (Law Journal (2) and Weekly Reporter (3)) the opinion is based on the doctrine that the judgment in the action, apart from sub-section 4, concluded the plaintiff as *res judicata*. With this I am wholly unable to agree; and counsel before us rested the case not on estoppel but on election. A claim based on accident is in its nature absolutely different from an action for negligence, depends on distinct conditions, and may be met by defences which have no application to an action. How could a judgment for defendant founded on contributory negligence of the plaintiff estop the plaintiff in a claim where contributory negligence (apart from serious and wilful misconduct) is an irrelevant topic? or how could the failure of an action for want of proof of negligence be *res judicata* as to a subsequent claim founded on mere accident without negligence?

Again, does Sir A. L. Smith's *dictum* apply to a case (as here) where the claim precedes the action? Such a claim might be defeated on the point that the claimant was not within the operation of the Act, or for some technical reason inapplicable to an action. I doubt if any such question was present to the Lord Justice's mind.

Any opinion of so eminent a Judge is entitled to great respect; but if the *dictum* is attributed to the doctrine of *res judicata*, it is, I think, erroneous, and if based on the principle of election—the only point argued before us—it is opposed to what I consider the true construction of the Act. The difficulties attending the

(1) [1899] 2 Q. B. 333. (2) 68 L. J. Q. B. 666.
(3) 47 W. R. 551; see also 80 L. T. (N. S.) 672.

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defendants' construction are not adverted to by Sir A. L. Smith, and as his observation was unnecessary to the decision of the case, I feel at liberty to act on my own view.

According to defendants, the moment the workman chooses one remedy he, at once and for ever, loses the other, and the result of the proceeding he has elected to take is immaterial. Subsection 2 (*b*) does not, however, expressly impose any such consequential forfeiture, and it cannot be implied. The explicit prohibition of double compensation suggests the contrary inference; it is inconsistent with the notion that an incompetent, abortive, and fruitless proceeding can be a bar, or that election of one remedy, irrespective of result, necessarily excludes the other.

The case is one of great doubt, and my impression has fluctuated during and since the argument; but I have come to the conclusion that the action is maintainable, that the judgment must be reversed, and a new trial awarded. As the defendants objected to evidence being given and the plaintiff's rights ascertained before Mr. Justice Johnson, the costs of that trial, which was made abortive by their action, as well as the costs of this motion, must be paid by the defendants.

J. L.

Appeal. 1902.

May 2.

The defendants appealed (1).

Ronan, K.C., and *R. C. K. Wilson* (with them *Gordon, K.C.*), for the appellants:—

Edwards v. *Godfrey* (2) is an express authority in favour of the defendants' contention. The judgment of A. L. Smith, L.J., was not a mere *dictum* as suggested by the judgments of the majority of the Divisional Court, for as there is nothing in subsection 4 to limit the plaintiff's right of action in *Edwards* v.

(1) Before FITZ GIBBON, WALKER, and HOLMES, L.JJ.
(2) [1899] 2 Q. B. 333.

Godfrey (1), the only ground for the judgment was the exclusive nature of the option which the plaintiff had exercised.

It has been argued that the words "nothing in this Act shall affect any civil liability of the employer" are inconsistent with the liability being affected by the exercise of an option by the workman. The words are not capable of this construction, for admittedly a successful claim resulting in an award of compensation affects the civil liability of the employer.

The true construction of sub-section 2 (*b*) is to be discovered by reference to sub-section 1, which in absolutely unqualified terms created a liability to compensation in case of accident arising out of, and in the course of, the specified employments. The first half of sub-section 2 (*b*) down to the words "commencement of this Act" is in favour of the workman, and renders the employer liable to damages in certain cases notwithstanding the unrestricted words as to the scheduled compensation being the measure of liability according to sub-section 1. The second half of the sub-section is in the employer's favour, as it prevents his being held liable in an action at law, except in the case of negligence or wilful act, though without this clause it might have been argued that under sub-section 1 there was a statutory right to compensation enforceable by action in every case of accident within the Act.

The words "shall not be liable to pay compensation both independently of and under this Act" may be intended to meet the case of compensation paid under section 3 of the Act, or under a private arrangement entered into without going to arbitration: *Little* v. *M'Lellan* (2), cited in Bowstead at p. 23.

Cherry, K.C., and *E. A. Ennis*, for the respondent:—

The workman is not barred from bringing an action in the Superior Courts, unless he is paid or compensated, or an award is made by the County Court Judge. *Edwards* v. *Godfrey* (1) does not govern this case; it was the converse of this case, because the workman there first sued in the Superior Court, and then brought a proceeding in the County Court. The Scotch case of

(1) [1899] 2 Q. B. 333. (2) [1900] 2 Fraser, 387.

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Little v. *M'Lellan* (1) is distinguishable. There a workman took payment for six months, and gave receipts as and for compensation under the Workmen's Compensation Act, and it was held that he was barred from his action in the Court of Session.

The defendants rely on the option clause in sect. 1, subsect. 2 (*b*). That section relates only to cases in which the question of double compensation arises, and cannot deprive a workman of his remedy under the pre-existing law: simply by reason of his having already unsuccessfully prosecuted a claim for compensation under the Act. "Claim for compensation" means not the initiation of proceedings before the Court by which compensation is to be assessed, but a notice of a claim for compensation sent to the workman's employer: *Powell* v. *Main Colliery Company* (2).

May 9.

FITZ GIBBON, L.J.:—

This case raises a difficult and important question on the construction and effect of the Workmen's Compensation Act, 1897, and also on the principle and extent of the decision of the English Court of Appeal in *Edwards* v. *Godfrey* (3), as to concurrent remedies at common law and under the statute, for the same injury to a workman.

The plaintiff was a boy employed at weekly wages, and was permanently injured in the course of his employment, while working at dangerous sawing machinery in the defendants' factory in Dublin. He took proceedings in the Recorder's Court to obtain compensation under the Act. His claim was refused by an order in the following terms:—

"It appearing to the Court that the applicant was not sufficiently long in the respondents' employment under the above-mentioned Act, the Court doth refuse the application without costs."

It is now conceded that the employment was one to which the Act applies. The order refusing the application was made upon the authority of the decisions of the English Court of Appeal in *Lysons* v. *Knowles* (4), and *Stuart* v. *Nixon* (5), which were reversed by the House of Lords (6) on December 14, 1900, after the

(1) [1900] 2 Fraser, 287.
(2) [1900] App. Cas. 366.
(3) [1899] 2 Q. B. 333.
(4) [1900] 1 Q. B. 780.
(5) [1900] 2 Q. B. 95.
(6) [1901] App. Cas. 79.

Recorder's decision, from which no appeal was taken, and after the commencement of this action.

The writ was issued from the Queen's Bench on December 4, 1900, claiming damages for negligence and improper conduct of the defendants in not properly safeguarding dangerous machinery, in wilfully employing the plaintiff to do work which required to be done by a skilled workman, they then knowing that the plaintiff was not a skilled workman, and in not conducting their business in accordance with the Factory Acts.

In addition to defences upon the merits, the defendants pleaded that before action brought the plaintiff had applied to the Recorder for compensation under the Act of 1897 in respect of the same injuries, and that the Recorder, having jurisdiction, and having duly heard the application, dismissed same; therefore the defendants submitted that the plaintiff, having exercised his option under sect. 1 (2) of the said Act by the institution of the said proceedings, was not entitled in law to maintain the present action. The case came on for trial before Johnson, J., by a jury, on November 23, 1901. After taking evidence, he directed the jury to find for the defendants upon this plea, and gave judgment for them with costs. The plaintiff moved the King's Bench for a new trial; that Court set aside the verdict and judgment, and ordered a new trial, the defendants to pay the costs of the trial and argument.

From this order the defendants have appealed.

The question turns upon the Act, sect. 1, which, so far as material, is in these terms:—"If in any employment to which this Act applies personal injury by accident in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act. (2) Provided that:—(*b*) when the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay

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compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid."

It has been argued that the effect of these provisions is elucidated by the provisions of sub-sect. (4), dealing with the case where the workman sues at law for damages, which was the subject of the decision in *Edwards* v. *Godfrey* (1). I must refer to sub-sect. (4) and to that decision, but I consider it my first duty to consider the provisions which apply directly to the case before us, which are in the terms which I have quoted.

These provisions appear to me, first, to affirm the liability of the employer to pay compensation under the Act in the case of every personal injury by accident arising in the course of the employment to a workman. This liability is then made subject to a proviso which divides accidents into two classes :—(1) Injuries for which the employer is responsible, *i.e.* is under "civil liability" irrespectively of the Act; (2) Accidents not actionable otherwise, but for which the employer is for the first time made "liable to pay compensation" under the Act.

As to the latter class, the last clause of the proviso precludes any construction of the Act which would subject the employer to an action independently of the Act, or would make him liable to anything but "compensation in accordance with the First Schedule."

As to the former class, the earlier clause of the same proviso confers upon the workman an "option," either to claim compensation under the Act or to take the same proceedings as were open to him before the Act, but it enacts that nothing in the Act "shall affect any civil liability of the employer."

The real question which we have to decide is whether a civil liability existing independently of the Act is so affected by claiming compensation under the Act that the right to sue for damages at common law is taken away by the workman's exercise of the option which the Act gives him to "claim compensation." If it

(1) [1899] 2 Q. B. 333.

be so taken away, it must be forfeited and lost by the mere act of claiming the compensation, whether compensation be awarded or not, and even though the tribunal which is empowered to grant compensation has dismissed the claim upon the ground that the case was not within the Act at all, or that the statutory tribunal had no jurisdiction to entertain it.

In my opinion this is not the meaning or effect of the clause. Such a construction seems to me to be inconsistent with the leading provision that "nothing in this Act shall affect any civil liability of the employer." It further appears to me to be inconsistent with the concluding provision that the employer shall not be liable to any proceedings independently of this Act "*except* in case of such personal negligence or wilful act as aforesaid," which exception includes every case of "civil liability of the employer." Furthermore, I think it inconsistent with the central provision which protects the employer from liability "to pay compensation for injury to a workman by accident arising out of and in the course of his employment" (which words include injuries for which the employer is under civil liability) "both independently of and also under the Act." In my opinion the protection is confined to *double payment*, and that it is not the mere *claim*, but the *recovery* of compensation under the Act, which puts an end to the civil liability to damages which is otherwise not to be affected by anything in the Act. This is the construction put upon sub-sect. 2 (*b*) by the majority of the King's Bench, and it appears to me to be right, unless it can be shown to be wrong by references to other parts of the Act.

The English Court of Appeal decided in favour of the employer in *Edwards* v. *Godfrey* (1) upon sub-sect. (4), which does not directly apply to this case, but to the case in which a workman had brought "an action to recover damages independently of the Act," and had been defeated. Edwards first brought an action at common law, and the jury found a verdict for the defendant upon the ground of contributory negligence. He made no application in that action to have it determined whether the injury was one for which the defendant would have been liable to pay compensation under the Act, although contributory

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negligence was not *per se* an answer to a claim for such compensation. He allowed judgment to be entered for the defendant, and he then instituted a proceeding for compensation under the Act in the County Court. It was held that he could not do this. Sub-section (4), which deals with that case, is in these terms:—"If an action is brought to recover damages independently of this Act, and it is *determined in such action* that the injury is one for which the employer is not liable in such action, *but that he would have been liable to pay compensation* under the Act, the action shall be dismissed, but the Court in which the action is tried *shall*, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which in its judgment have been caused by the plaintiff bringing the action instead of proceeding under this Act."

So far from assisting the defendants here, it appears to me that a comparison of this clause with sub-sect. 2 (*b*) helps the plaintiff. It makes express provision enabling a workman who has wrongly proceeded at law to obtain any compensation to which he is entitled under the Act, without instituting any new proceeding under the Act. It gives jurisdiction to the Court in which the action is brought to "determine" whether he is entitled to such compensation. Sub-sect. 2 (*b*) contains no corresponding provision in the converse case. It would have been a dangerous and abnormal extension of the powers of an inferior Court to have given it jurisdiction, where it found that a claim for compensation under the Act was unsustainable, to proceed to determine whether the employer was under "civil liability" for damages, and to exercise the powers of the High Court by assessing them. No such power was given by sub-sect. 2 (*b*).

Furthermore, the conferring of jurisdiction to assess the compensation in the action, where damages are determined *not* to be recoverable, makes it unreasonable to impute the intention to the Legislature in the converse case, where a workman makes the mistake of first claiming compensation to which he is not entitled, that this claim shall not only be refused, but shall, by the mere making of it, forfeit his remedy at common law. The conclusion that this was not intended is fortified by the provision in sub-sect. 2 (*b*), that "nothing in this Act shall affect any civil liability

of the employer," and it even seems probable to me that this provision was inserted for the very purpose of preserving the right of suing upon that "civil liability." The option is in the Act, and "nothing in this Act shall affect any civil liability."

As the decision in *Edwards' Case* (1) was pronounced upon sub-sect. (4), it cannot rule the construction of sub-sect. 2 (*b*). Even upon sub-sect. (4) I entertain grave doubts that it is in accord with the more liberal construction which the House of Lords has since put upon the Act, in several respects, in favour of the workman. But it may be supported by several arguments which do not apply to sub-sect. 2 (*b*). A special remedy was given; the workman was enabled to "choose" whether he would avail himself of it; and it may well be that, by declining to do so, he abandoned his right, and in effect "elected to be non-suited." Again, if he were held free to proceed *de novo* for compensation, he would thereby be enabled to defeat the provision enabling the Court which had cognizance of the action to recoup the employer for the costs of its dismissal, which under the First Schedule (14) could not be set off against an award of compensation by the County Court in a subsequent proceeding.

The introduction of this protection of the employer against the excessive costs of an action seems to me to make it more improbable that the workman was left, in the converse case, unprotected against the danger of forfeiting his civil right to damages altogether by the mere act of going first to the cheaper tribunal. But be that as it may, I cannot adopt the observations of Smith, L. J., as applicable to sub-section 2 (*b*). The plea here cannot be a "defence of *res judicata*," for the judgment of the Recorder, whether right or wrong, was only a determination that the claim for compensation under the Act was not maintainable. The ground of dismissal had nothing to do with the right of suit for damages upon the civil liability, and it could not operate as a determination that such liability did not exist.

Furthermore, the alleged forfeiture of the right of action at law must arise not *upon the judgment* of the Recorder, but upon

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the previous act of the plaintiff in exercising the option to "*claim* compensation under the Act." We must remember that the House of Lords, reversing the Court of Appeal in *Powell* v. *Main Colliery Company* (1), has now held that these words, in another section, do not mean "take or commence a proceeding under the Act," but that they are satisfied by merely *giving notice of a claim under the Act.* Is it a likely or even a reasonable construction which would give to the service of such a notice by an injured workman the effect of finally and completely relieving his employer from civil liability in any Court of law?

If we think of all the technical and artificial limitations to the liability of employers under the Act, such a construction would indeed have far-reaching consequences. A mistake in the nature of an "employment," in the height of a building, in the depth of a quarry, or in the use of a "scaffolding"; or misunderstanding the Delphic definition of a "factory," of "undertakers," or the statutory meaning of "occupation," or of "loading or unloading" a ship, or of "repairing" a building, might lead to an untenable claim for compensation, and the mere service of that claim would deprive an injured workman of his right of suit for damages, however large, and give immunity from "civil liability" to his employer, even in a case of his own "personal negligence or wilful act." Such a punishment does not fit the crime, and I decline to inflict it by elaborate implication from confused and complicated clauses.

Section 6 was relied on. It provides that "where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the workman may, at his option, proceed either at law against that person to recover damages, or against his employer for compensation under this Act, *but not against both*, and if compensation be paid under this Act the employer shall be entitled to be indemnified by the said other person."

Two observations material to the present case may be made upon that section. First, the conferring of the option is coupled

(1) [1900] App. Cas. 366.

with an *express prohibition* (not to be found in sub-section 2 (*b*)), of proceeding against both; secondly, the indemnity of the employer arises only "if compensation *be paid* under the Act." This corroborates the construction which I put on sub-section 2 (*b*), *i.e.* that *payment of compensation* for the injury is necessary to get rid of the "civil liability" of the employer. Such payment would be, in law and in fact, *satisfaction* for the injury, and under the section it could be pleaded as such.

Accordingly, the considerations arising upon the other sections not only do not conflict with the conclusion at which I should have arrived upon sub-section 2 (*b*) alone, but they fortify that conclusion.

In my opinion, therefore, this appeal should be dismissed with costs.

WALKER, L.J.:—

In this case we have to interpret an Act, the construction of which has caused embarrassment to English and Irish Courts, and has been condemned by the Judges in the highest tribunal as awkward and faulty in its drafting. The particular section under consideration is singularly open to these criticisms, and it is not surprising that it has led to differences of opinion both in the King's Bench Division and here.

For myself, I am prepared to adopt the judgment of Mr. Justice Gibson, while I, to a great extent, share his doubts.

The Act of 1897 conferred great and new benefits upon a workman, but it must be remembered that such workman had vested rights both at common law and under the Employers' Liability Act, 1880, and clear legislation is necessary before he can be deprived of such vested rights.

On the other hand, it is not unreasonable to attach limitations to newly created rights.

If I am a party to a reversal of the King's Bench Division, it follows that if a workman has started his claim too late under section 2, or if he abandons it upon advice that the Act excludes it, or if it is decided by the competent Court that the employer is not an "undertaker" within section 7, or that the employment is not one within the definition, say, of "factory" upon which so

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many conflicting decisions have been pronounced, so that the merits of the case have not been reached, the workman can never resort to his old common law right to recover damages for acts possibly of personal and wilful negligence. I cannot be a party to such a decision unless I am driven to it by clear words.

It was pressed that if my view is right the workman might equally resort to his action if his claim was dismissed owing to his own serious and wilful misconduct. If that were so held it is difficult to see how in an action the case could even get to the jury, and the danger is hardly real, but it is not the case we have to deal with. On the other hand, it follows logically from the defendants' argument that a "claim" once launched determines the *forum* once for all, and it is the same with a writ (though discontinued), and that the election is not only binding, but cannot be receded from.

It was not unreasonable when the new right was conferred that limitations and conditions should be attached to it. Some of those conditions relate to the question whether it is possible at all to approach the consideration of giving the workman compensation. There are others regulating the amount which he can be awarded when jurisdiction exists, and another providing for disallowance when (the jurisdiction existing) serious and wilful misconduct has been proved. It may be that logically the consequences ought to be the same, but it is not the point which in this case we have to decide.

Is there then clear legislation that when the claimant has launched his claim, and been told by the competent Judge (it appears wrongly) that the Act has no application to his case, he cannot recur to his old common law remedy? I cannot find such a prohibition.

The sub-section begins when the employer would before the Act have been liable to pay damages to the workman, "nothing in this Act shall affect any civil liability of the employer." "Nothing in this Act" means no provision in any part of this Act shall interfere with civil liability. It is obvious that civil liability in the case in hand is taken away if the argument for defendants be correct; and then the section goes on: "But in

that case," *i. e.* when he has the two rights, "the workman may at his option either claim compensation under this Act or take the same proceedings as were open to him before the commencement of this Act."

Prima facie those words, having regard to the full saving of his former rights, are consistent with saying that when he has the double right he has also a double remedy. It does not follow he can pursue them concurrently, because, I think, the Court in which the action was brought would have power under its ordinary jurisdiction to stay one.

Now if the argument for the defendants be right, the words that follow after "the commencement of this Act" are unnecessary, because already it was provided that he could take only one remedy, and double relief never could exist, but the sub-section proceeds: "But" (an important word) "the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment, both independently of and also under this Act." This provision against double payment is natural and reasonable, but its existence is only consistent with double remedy.

The concluding words seem to me only to mean the existing liability, already fully saved, shall not be enlarged by this enactment.

I cannot help thinking that if sub-section (*b*) stood alone, the case would be reasonably clear. Is it made more or less clear by section 6? I think more clear, because there we find the prohibition: "but not against both," and this I understand to be the recent decision of Mr. Justice Wright in *Tong* v. *Great Northern Railway* (1), reported in the newspapers of the 30th April. If in sub-section (*b*) we had the words "but shall not take both proceedings," then we should have the prohibition, and we could not, or need not, have the provision against double compensation following.

The matter is complicated, and rendered more difficult by the way in which the converse case is dealt with under sub-section 4.

(1) Times R. 566.

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With reference to sub-section 4, it is observable that there is a time limited for taking proceedings under a claim, but none, of course, for an action, and also that in proceedings on a claim there is no means of putting forward a counterclaim, and also that under the Schedule Rule there can be no set off against a weekly payment ordered, and, therefore, partly in ease of the workman and partly in ease of the employer, the 4th sub-section says that if the workman, within the six months, brings an action it can be utilized as a start for applying the claim proceedings though dismisssed, but there is provided a statutory counterclaim for the costs of the action. Further, there is an affirmative right created by the 4th sub-section when the action is brought—a right which is attached to the unsuccessful action—and thus it may fairly be said that this provision excludes the idea of an independent claim. Such a limitation may not unreasonably be attached to the new right, and in most cases, at all events, the action would not be terminated till six months had elapsed. But when the action is brought after an abortive claim in which costs have been incurred, there is in all cases a right of counterclaim for the costs.

Now in *Edwards* v. *Godfrey* (1) the very case dealt with by sub-section 4 arose, for which express provision had been made, and for the previous costs. The injustice on which Smith, L.J., so strongly relied cannot arise when the action is brought after the abortive claim, and the fact that no provision is made for such a case, while there is for the converse one, seems to show no interference was intended with the pre-existing legal right.

I agree that there is general language used by Lord Justice Smith, which may be said to include such a case as the present, but I think it must be understood as referring to the case before him, and if it goes beyond that, and puts a construction on sub-section 2 (*b*) when an abortive claim is first made, I cannot adopt his observations as furnishing a true guide.

In result, I think the case is not legislated for, and that the common law right is not extinguished, and is, in fact, on the true reading of the sub-section, preserved.

(1) [1899] 2 Q. B. 333.

HOLMES, L.J. :—

The plaintiff in this action, alleging that he was a workman employed by the defendants, and that he had sustained personal injury by an accident arising out of and in the course of his employment, took the steps prescribed by the Workmen's Compensation Act, 1897, for the purpose of obtaining compensation thereunder, which was refused by the Recorder of Dublin, before whom the claim came for adjudication. The plaintiff thereupon brought the present action to recover damages for the same injury upon the ground, as I interpret the pleadings, that it was caused by the personal negligence either of the defendants themselves or of some person for whose act or default they were responsible.

The defence dealt with at the trial before Johnson, J., relied on the proposition that the plaintiff, having claimed compensation under the Act of 1897, was thereby precluded from bringing this action. It was established by the documents and oral evidence that the claim and action were brought in respect of the same injuries arising from the same accident, and that at the time of the accident the plaintiff was in the employment of the defendants.

It appears from the Recorder's certificate that his reason for refusing to award compensation was that the plaintiff had not been in his master's employment for a sufficient length of time to bring him within the provisions of the statute; and it is said that in coming to this conclusion he followed a decision of the English Court of Appeal, which has since been reversed or overruled by the House of Lords. This explanation of the Recorder's action is, doubtless, correct; but the ground of his adjudication, and its accuracy in point of law, seem to me to be immaterial to the question which we are asked to decide. We are not even at liberty to assume that there were not other objections to the plaintiff's claim for compensation more valid than that mentioned in the certificate. We know nothing of the circumstances of the accident; and it is possible that the Recorder, having, as he thought, ascertained one good reason for refusing the application, did not inquire into others relied on in the defendants' notice of dispute. I therefore approach the case upon the narrow and simple basis

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that the plaintiff having met with an accident causing him personal injury while in the defendants' employment, brought this action after he had failed to sustain a claim made by him under the Act of 1897.

Whatever may be thought of the merits or demerits of that statute, it cannot be denied that an exceptional difference of judicial opinion has arisen in construing its provisions. A striking instance of this is to be seen in the present case. Johnson, J., before whom it first came, decided it in favour of the defendants. In the Divisional Court the same view was taken by Boyd, J., as against three other Judges; but of these Mr. Justice Gibson has stated counterbalancing arguments and considerations of such weight as to account not only for the fluctuations of his own mind, but also for the want of unanimity amongst his colleagues. If we have here also a divided Court, we may console ourselves with the reflection that this is nothing new in decisions dealing with workmen's compensation. Previous to the Act of 1897 the injuries received by a workman in the course of his employment for which he was entitled either at common law, or by statute, to be compensated by his master were confined to a very limited class. They may be summarized in words taken from the first section of the Act as injuries caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible. Outside this category stood most of the accidents occurring in the course of a workman's occupation, and causing sometimes his death—more frequently his temporary or permanent disablement—accidents attributable to the negligence of fellow-workmen, to his own carelessness, to causes beyond human control, or incapable of detection or explanation. In these cases the workman ran all the risk and bore all the loss unless the employer was induced from motives of charity or a sense of justice to come to his aid. This state of the law was objected to by workmen engaged in dangerous occupations; and the statute of 1897 was passed to remedy what was admitted to be a legitimate grievance. Its policy was that workmen receiving injuries in the course of certain specified employments should be entitled to obtain from their employers compensation according to a prescribed scale in all cases where it is

not proved that the injury is attributable to the serious and wilful misconduct of the workman himself. The benefit thus conferred on one class involved a corresponding burden on another; and it was to be expected that care would be taken to impose this additional obligation upon employers in the most reasonable and least oppressive way. Accordingly, a comparatively simple and inexpensive machinery was provided for ascertaining and enforcing the newly created rights, and it was probably assumed that for the future workmen injured in the specified employments would as a rule seek compensation by means of it. This would necessarily be so in the vast number of cases where the only right to compensation would be that given by the statute; and even where the injury was received under circumstances that entitled the workman to sue for damages at common law, or under the Employers' Liability Act, it would probably be more for his interest to adopt the less expensive and surer remedy. It was not, however, the intention of the Legislature that the new provisions should supersede rights of action that had theretofore existed; and this is made clear by the declaration that "when the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer." Hereupon another important question is suggested:—Is a workman to recover in respect of the same injury compensation under the statute and damages independently of it? This is settled by the express enactment that the employer shall not be liable to pay compensation in both ways.

But there remains a further matter of equal importance for consideration and regulation. If the employer is not to be liable to pay compensation both under and independently of the Act, is he to be subjected to the expense, trouble, and inconvenience of two sets of proceedings? In many cases the question at issue in a claim under the Act and in a common law action for damages is the same. If I am to judge by what I read and hear, claims for compensation are often resisted on the ground that the injury is attributable to the serious and wilful misconduct of the workman; and two or three of the most recent cases before this Court have turned on this point. But this is a good defence to an action for

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damages; and it would seem highly unreasonable that a matter that had been fought out and adjudicated upon in one tribunal could be forthwith re-opened in another. I think that it must have been the desire to guard against an employer being subjected to two law suits to recover compensation for the same injury that led to the introduction immediately after the provision that secures to the workman his old right of action the remarkable words, "but in that case the workman may at his option either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act."

I am unable to give any but one meaning to these words. As I understand the English language, when an option is given to a person to take either of two courses, he is not to take both; and as I understand legal principle, an option or election of this kind once exercised must be adhered to. The whole of sub-clause (*b*) of section 1, sub-section 2, of the Act is clumsily expressed. Indeed it is inevitable that statutes which excite great interest, and which are consequently largely amended in their progress through Parliament, must lose the symmetry of the original draft; but the construction I have adopted does no violence to the language, and gives effect to every part of it. It is objected that the civil liability of the employer will be affected if he is relieved from it by the fact that the workman has previously claimed under the Act; but the opening words of the clause are merely intended to preserve such rights as the workman had outside the Act, provided he desires to rely on them. Admittedly the recovery of compensation under the statute would deprive him of these rights; and there is nothing inconsistent in a provision that his making a claim for compensation would have a similar effect. It is also argued that if a claim for compensation makes it impossible to take other proceedings, there was no necessity for the enactment that the employer is not to be liable to pay double compensation. Possibly the second of these provisions is included in the first; but surplusage has long since become as common in Acts of Parliament as in other kinds of literature. The clause, however, as to the option, whatever may be its meaning, is not surplusage. It adds a distinct and separate term to the section; and the only

meaning I can extract from it is what I have stated. This interpretation does not involve injustice or hardship. The Legislature, in conferring on workmen a new and most valuable right of compensation for personal injuries, provides that when they elect to avail themselves thereof, they abandon other modes of recovering damages for the same injuries. This is surely not unreasonable. The difficulty in ascertaining to what employments the Act applies, which has caused so much litigation, was probably not anticipated; but even if it had been, it was not too much to ask a litigant to choose between two modes of procedure each having the same object.

The fourth sub-section seems to me to aid the construction I have adopted, and to take away all reasonable grounds of complaint to which the option clause might otherwise have given rise.

It was introduced in the interests of the workman, and for the purpose of placing him in a better position than he would have been in without it. I think that the idea underlying it was to relieve him to a certain extent, and, without undue prejudice to the employer, from the embarrassment of the option clause. In a doubtful case he can sue independently of the Act; and if he fails the Court that tries the case can award him compensation under the Act if he is entitled to it. In the case of *Edwards* v. *Godfrey* (1) it was held by the Court of Appeal in England that a claim for compensation under the statute brought within the prescribed time by a workman who had been defeated in an action for the recovery of damages for the same injury could not be sustained. It seems to me that this decision could only have been arrived at by giving clause (*b*) the construction I have adopted. There is nothing in sub-section 4 to prevent the unsuccessful plaintiff from claiming compensation by arbitration in accordance with the second schedule. It merely enables him if he shall so choose to have compensation assessed by the Court.

I feel that I should be departing from the only principle to which I can attribute this decision if I were to refuse the defendants judgment in the present action.

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For the foregoing reasons, I am unable to concur in dismissing the appeal; but I need hardly say that in view of the difference of opinion, and the obscurity of the statute, I dissent with considerable diffidence.

Solicitor for the plaintiff: *F. H. Menton.*
Solicitors for the defendants: *Bradley & Son.*

R. D. M.

K. B. Div. 1901. June 14.

COUNTY COUNCIL OF CLARE, APPELLANTS; PATRICK M'INERNEY, RESPONDENT (1).

Poor-rate—Summary proceedings for recovery of—Justices—6 & 7 Wm. 4, c. 116, s. 152—1 & 2 Vict. c. 56, s. 73.

Notwithstanding the repeal of sect. 152 of 6 & 7 Wm. 4, c. 116, by the Local Government (Ireland) Act, 1898, poor rate is still recoverable summarily before Justices at Petty Sessions.

The complaint in such case should be preferred in the name of the collector. A complaint brought in the name of the county council *held* properly dismissed by the Justices.

CASE STATED by the Justices of the county of Clare.

At a Petty Sessions Court held at Ennis on the 8th March, 1901, a complaint was preferred by the County Council of Clare, the appellants, under sect. 73 of the 1 & 2 Vict. c. 56, charging that Patrick M'Inerney, the respondent, was indebted to the complainants in the sum of 6*s.* for poor rate, six days' notice to pay the same having been duly served on him. At the hearing the appellants proved that the poor rate had been duly made and assessed on the respondent, and that the said sum of 6*s.* was due by him. They also proved that the notice required by 6 & 7 Wm. 4, c. 116, sect. 152, had been duly served upon the respondent. They contended that the Justices were entitled to make the order sought for under the provisions of sect. 73 of the Poor Relief (Ireland) Act, 1838, 1 & 2 Vict. c. 56, that the effect of

(1) Before PALLES, C.B., and ANDREWS, JOHNSON, and GIBSON, JJ.

that section was to incorporate therein the provisions of sect. 152 of the Grand Jury (Ireland) Act, 1836, 6 & 7 Wm. 4, c. 116, for the summary recovery of county cess, and to make them applicable to the recovery of poor rate, and that the repeal of sect. 152 of the last-mentioned Act by the Local Government (Ireland) Act, 1898, did not deprive the Justices of the power to make orders for the recovery of poor rate under the provisions of sect. 73 of 1 & 2 Vict. c. 56. There was no appearance for the respondent. The Justices made the following order:—"Dismissed without prejudice, but subject to a case stated, the magistrates being in doubt under what statute, if any, they can make the order sought for, which has heretofore been made under 6 & 7 Wm. 4, c. 116, sect. 152, a section now repealed by the Local Government (Ireland) Act, 1898."

The present case was stated by the Justices to obtain the opinion of the Court upon the following questions:—(*a*) Can the Justices in Petty Sessions make the summary order sought for to recover the poor rate notwithstanding the repeal of sect. 152 of the Grand Jury Act by the Local Government (Ireland) Act, 1898? (*b*) If so, what statute or statutes and section or sections are to be set out in column 8 of the Petty Sessions Order Book as authorizing the order made, as section 73 of the Poor Law Act does not in itself give any summary jurisdiction to Justices? (*c*) Should a complaint at Petty Sessions be preferred in the name of the county council, as in this case, or be in the name of the collector as provided in the said section of the Grand Jury Act?

P. Lynch, for the appellants, referred to 1 & 2 Vict., c. 56, sect. 73; 6 & 7 Wm. 4, c. 116, sect. 152; Local Government (Ireland) Act, 1898, sect. 110, 6th schedule.

There was no appearance for the respondent.

The Court answered the questions submitted to them as follows:—(*a*) The Justices in Petty Sessions can make such summary order. (*b*) The statute to be set out is 1 & 2 Vict. c. 56, sect. 73. (*c*) The complaint should be preferred in the

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name of the collector. And it was adjudged that the Justices were correct in point of law in their determination, and that the same should be affirmed.

Solicitor for the appellants: *John F. Cullinan.*

J. G. T.

K. B. Div. 1901. Dec. 17, 18. 1902. Jan. 18.

HARBINSON *v.* COUNTY COUNCIL OF COUNTY ARMAGH (1).

(1901. No. 1.)

Negligence—Liability of local authority for non-repair of a highway—County council—Local Government (Ireland) Act, 1898, sections 4 and 82.

A county council, as the local road authority, is not liable at common law in an action for damages for injury caused by negligent omission on their part to repair a highway under their control; nor is such immunity altered by the provisions of the Local Government (Ireland) Act, 1898, sections 4 and 82, imposing upon a county council new and additional obligations in respect of the maintenance and repair of highways.

NEW TRIAL MOTION.

This action was brought by the plaintiff for damages for personal injuries, and for injuries to his horse and car, sustained by reason of the defendants' alleged negligence in maintaining a road in their county. It was tried before Mr. Justice Barton and a special jury at the Belfast Summer Assizes, 1901. On the 30th of March the plaintiff was driving into Portadown with a horse and cart laden with eggs. When passing over a bridge or culvert, where the public road crossed a small stream, the horse put his foot into a hole and fell; the cart was broken, and the plaintiff was seriously injured. The evidence was to the effect that this hole in the crown of the bridge or culvert was caused by a stone in the arch of the bridge falling out of its place, with the result that the surface of the road had sunk in. This had occurred

(1) Before LORD O'BRIEN, L.C.J., and JOHNSON and GIBSON, JJ.

within twenty-four or forty-eight hours prior to the accident. No evidence of any active misfeasance by the defendants or their employees was offered. At the close of the plaintiff's case, counsel for the defendants asked for a direction, but the learned Judge declined to direct. For the defendants the county surveyor and other witnesses were called. From their evidence it appeared that this particular road was in the surveyor's charge, no tenders having been sent in for the contract for its maintenance. There never had been anything wrong with this bridge for the last fifteen or sixteen years. A surface man had been over the road examining it on the 11th March. Since the accident the defendants had rebuilt the bridge. The surface man had been there on March the 29th, and (it was stated) there was no hole in the bridge at that time. The following questions were left to the jury:—

1. To what damages (if any) is the plaintiff entitled?—*Ans.* £225.

2. Was the damage caused by mere wearing out or non-repair of the road, or by the dangerous condition of the culvert?—*Ans.* By the dangerous condition of the culvert.

3. Was the culvert originally properly constructed having regard to the traffic at that time?—Not answered.

4. Was the damage caused by the negligence of the defendants in allowing the culvert to remain in a condition which was dangerous having regard to the traffic which they knew or ought to have known the culvert would have to bear?—*Ans.* Yes.

5. Was the culvert at the point where the accident occurred in a dangerous condition on the day before the accident, and were the defendants guilty of negligence in having allowed it to remain in that dangerous condition until the accident happened in consequence of such dangerous condition?—*Ans.* Yes.

Upon these findings the learned Judge gave judgment for the plaintiff for £225 and costs. He stated in his report that the plaintiff had undoubtedly suffered considerable injuries and loss, but that serious legal difficulties were in his way having regard to the authorities. In putting questions to the jury, his Lordship had in mind *Russell* v. *Men of Devon* (1); *Cowley* v. *Newmarket*

(1) 2 T. R. 667.

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Local Board (1); *Municipality of Bathurst* v. *Macpherson* (2); *Municipal Council of Sydney* v. *Bourke* (3); and *Victoria Corporation* v. *Patterson* (4). After the jury had retired, counsel for the defendants objected to the fourth question left to the jury, and asked his Lordship to direct that under no circumstances could there be an obligation on the defendants to strengthen a bridge in accordance with the increase of traffic. His Lordship declined so to direct. He stated that he had not directed to the contrary, but had left the question of fact to the jury, so that the Court might be able to judge as to the legal effect of the answer. His Lordship pointed out that the fifth question and finding, on which the plaintiff's counsel seemed principally to rely, related to an independent and subsequent alleged breach of duty. As to the third question, he considered that the jury acted reasonably in refraining from answering the third question, as there was little, if any, evidence of any breach of duty imputable to the defendants in reference to the construction of the bridge. His Lordship was not asked to leave any other question to the jury.

The defendants now moved that the verdict and judgment be set aside, and that judgment be entered for the defendants on the grounds (*a*) that the statement of claim did not disclose any sufficient cause of action; (*b*) that on the pleadings and evidence the Judge should have directed a verdict for the defendants, or, in the alternative, that a new trial be ordered on the ground of non-direction and mis-direction, and that the verdict was against evidence.

S. L. Brown, K.C., and *C. Murphy* (*Gordon, K.C.*, with them), for the defendants.

O'Shaughnessy, K.C., and *Chambers* (*The Solicitor-General* (*Campbell, K.C.*) with them), for the plaintiff.

Cur. adv. vult.

(1) [1892] App. Cas. 345.
(2) 4 A. C. 256.
(3) [1895] App. Cas. 433.
(4) [1899] App. Cas. 615.

LORD O'BRIEN, L.C.J.:—

This case is one of very considerable importance. The plaintiff sustained serious injuries by reason of a public road, the maintenance and repair of which was imposed by the Act of 1898 upon the defendants, being out of repair. It is admitted that the road was out of repair, and the question is whether the defendants, the County Council of county Armagh, can be made amenable in damages for the injuries sustained. If the cause of the injuries was mere omission on the defendants' part to repair the road, and not any act of commission by them, then upon the authorities the defendants are not responsible, unless the Local Government Act creates some new or added liability making them responsible as well for the consequences of omission on their part as for the consequences flowing from acts of commission.

It, therefore, becomes necessary to examine the facts, in order to ascertain whether the injuries sustained were the consequence of non-feasance on the defendants' part or in the nature of a positive act by them causing the injuries. If we find that there were such acts of commission on the part of the defendants, and that these were the efficient cause of the injuries, we need go no further. If, on the other hand, it appears that there was nothing more than non-feasance on their part, it becomes necessary to examine the Act of Parliament to see if any added liability be thereby imposed. If there be none, verdict and judgment must be entered for the defendants.

I shall later on have to say some few words in reference to the decisions that have been pronounced on the subject; in the first instance, however, I proceed to examine the facts. On Saturday, the 30th March, 1901, at about 9.30 a.m., the plaintiff, a grocer and farmer, who lived some four miles from Portadown, was proceeding into that town with a horse and cart with eggs to sell. When passing over a certain bridge, where the road crossed a small stream, the horse put his foot into a hole, which undoubtedly was in the crown of the bridge. The horse plunged, and the result of his efforts to recover himself was that he fell, the cart was broken, and the plaintiff sustained injuries admittedly

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of a very grave character. The accident is very succinctly described in the plaintiff's evidence. He states: "I had a valuable trap, a school-cart, a large one. I left home about 8.30. I know where the stream is in the townland of Drumakelly. There is a bridge there; a river or stream runs under it. There was a hole in the bridge; the horse went down into it with his off foreleg as far as the shoulder; the horse fell on his face and hit his jaw; his knees were broken; the trap was broken; nothing was left but the wheels; everything was smashed. On that side of the county road there is no fence for about 19 yards, and there is a great big pool at the side like an old flax-hole. The road was eaten away, or slid away by cattle. No repairs had been done to it for a long time. When the horse went into it, he made an effort to get out, and plunged forward; at the second effort he went down, with the trap and all and myself, into the pond at the side of the road. I was injured in the back, on the left side, and across the back. I fell forward in front of the boxes of eggs. The boxes all fell over me—a minute did it all. I was in bed about a month."

The next material witness is George Barraskill. He was examined for the plaintiff, and stated that about six o'clock on the previous evening, Friday, he was down at the place where the accident occurred, and that he saw the hole in the bridge. He stated that the hole was about the size of the opening of a zinc basket.

The next material witness was a man named M'Clatchey. He stated that he worked in a factory, and crossed this bridge night and morning when going to and from his work. He said that he remembered the day on which the accident had occurred to the plaintiff; that on the evening before he had his hand in the hole; that Barraskill had shown it to him; that the bottom of a zinc basket could have been put into it; that the surface was broken for a width of about 2 feet. He had been over the bridge in the morning. "It was right in the morning, but sunk-looking; it was a hole in the evening."

Another witness, Robert Graham, had also passed over this bridge with a cart, and stated that he had seen the hole when

passing by, and that the wheel of his cart had gone into and out of it.

This is the material evidence as to the condition of the place. M'Clatchey's evidence was principally relied on on behalf of the plaintiff. It is plain, I think, that, as he was constantly going over this bridge, and as he speaks of noticing its sunken appearance on the Friday, the bridge must till then have been apparently all right.

Witnesses were also examined for the defendants. Amongst these was John Donnelly, the assistant county surveyor. He stated that this road was in the hands of the county surveyor, and was not under contract. The last time he had seen the bridge before the accident it was to all appearance perfectly sound and safe. He saw it after the accident, and had the hole temporarily repaired; they were now building a new bridge. On the 28th March he had sent a man to go over the whole of the road and to repair anything that was wrong. The county surveyor, Mr. R. H. Dorman, was also examined. He had seen the place on the Tuesday after the accident, and noticed from underneath that a couple of stones of the sheeting of the arch had dropped down. He had been county surveyor for fifteen years, and there had never been a hole in this bridge to his knowledge.

It is clear then that this is a case of mere non-feasance; the road was out of repair, but there was no misfeasance, no act of commission on the defendants' part.

It remains then to deal with the course of judicial decision upon this subject, and to consider the question whether the Act of 1898 has in any way altered the law by imposing an additional liability upon the defendants. It has been established by a long line of authorities, extending over one hundred years, that road authorities are not responsible in damages at the suit of an individual in an action founded on non-feasance by them. The cases range from *Russell* v. *The Men of Devon* (1) down to the case of *Saunders* v. *Holborn District Board of Works* (2) in 1895.

(1) 2 T. R. 667. (2) [1895] 1 Q. B. 64.

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The various decisions on the subject down to the year 1892 have been succinctly examined by Lord Herschell in his judgment in *Cowley* v. *Newmarket Local Board* (1). He says :—

"It was held as long ago as the case of *Russell* v. *The Men of Devon* (2) that an action could not be maintained at common law by one of the public in respect of an injury sustained through a highway being out of repair. This decision was no doubt largely, but it was not exclusively, founded on the fact that the inhabitants of the county are not a corporation, and cannot be sued collectively. In the subsequent action of *M'Kinnon* v. *Penson* (3), brought against the county in the name of their surveyor for a similar cause, it was urged that the 43 Geo. 3, c. 59, s. 4, which enacted that the county might be sued in the name of their surveyor, had removed the only difficulty in the way of the plaintiff. It was held, however, that the effect of the statute was not to create a new liability, but only a more convenient method of enforcing existing rights. And in *Young* v. *Davis* (4) it was held in the Exchequer Chamber that a surveyor of highways was not liable to an action for injuries resulting from the breach of his duty to keep the highways in repair. It was argued in *Gibson* v. *Mayor of Preston* (5) that the Public Health Act, 1848, did something more than impose upon the corporation the duties and subject them to the liabilities of surveyors of highways, and that under the provisions of that statute they were liable to a person suffering through the non-repair of a highway. The Queen's Bench, however, in a considered judgment rejected this argument, and held that the defendants were not liable. The provisions of the Public Health Act, 1870, on which the appellant now relies, are precisely similar to those upon which the judgment in *Gibson* v. *Mayor of Preston* (5) proceeded. Your Lordships are asked to overrule that decision. I am not prepared to do so. The Legislature in 1875 re-enacted unaltered the provisions upon which this construction had been placed, and I cannot think that it was intended by the Legislature to impose the liability now contended for. The only case which can be relied on as affording any support to the appellant's contention is *Hartnall* v. *Ryde Commissioners* (6). But the legislation on which that case turned was not precisely the same, and the arguments which were so carefully considered and which prevailed in *Gibson* v. *Mayor of Preston* (5) do not appear to have been insisted upon. For it appears to be assumed in the judgment that if the defendants were

(1) [1892] App. Cas. 345, p. 353.
(2) 2 T. R. 667.
(3) 8 Ex. 319; 9 Ex. 609.
(4) 2 H. & C. 197.
(5) L. R. 5 Q. B. 218.
(6) 4 B. & S. 361.

liable to be indicted for the non-repair of the highway as for a misdemeanour, an action would lie by anyone specially aggrieved. No reasons are given for this conclusion, which seems to have been treated as a necessary consequence."

The principle upon which this long course of authority rests is thus very clearly stated by Lord Halsbury in the same case. He says at page 349 of the report:—

"The question appears to resolve itself into whether the public authorities in whom the highways are vested by the statute can be held liable in an action for any defect in the repair. I think in this case the liability would have to be put upon the ground that there was default in the construction of the highways through which an accident happened to a passenger. The wide consequences of the existence of such a right of action would be very serious.

"As long ago as 1788 a question of an analogous character was raised in the Court of King's Bench; and the argument then, as now, was that where one person received an injury by reason of any other person or persons omitting to do that which by law he or they are bound to do, he may maintain an action in the circumstances to recover satisfaction for the damage he has received in consequence of that omission.

"In that case it was said (which seems to me to be decisive of this case) that the principle which decides against this kind of action is accurately stated in Brooke's Abridgement, tit. Action on the Case, pl. 93, where it is stated that 'if a highway be out of repair by which my horse is mired no action lies, *car est populus et surra reforme per presentment*,' which must be understood to mean that as the road ought to be repaired by the public no individual can maintain an action against them for any injury arising from their neglect: *Russell* v. *The Men of Devon* (1)."

This is the language of Lord Halsbury; and it is precisely in point in this case. The highway was out of repair, and the horse was thrown down, and the driver, who was the owner, sustained grave injuries.

In *Cowley* v. *The Newmarket Local Board* (2) the evidence of neglect in fact was absolutely clear; there was clear and palpable neglect; the jury found that the defendants were guilty of negligence, and assessed the damages at £200. Yet the Judge

(1) 2 T. R. 667. (2) [1892] App. Cas. 345.

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who tried the case, Mr. Justice Denman, entered a verdict for the defendants, and his ruling was upheld by the Court of Appeal and by the House of Lords. Lord Hannen, in giving judgment in *Cowley's Case* (1), is reported to have said—

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> "The question, therefore, is reduced to this, whether the defendants, in whom the powers and liabilities of surveyors of highways are vested by statute, have thereby imposed upon them a liability to be sued for a cause of action which could not have been maintained against the surveyor of highways. This is a subject which has engaged the attention of the Courts on many occasions. The governing principle was stated in the Exchequer Chamber as long ago as 1863 in the case of *Young* v. *Davis* (2), that the surveyor of the highways was not liable to be sued for damage resulting from the highway being out of repair, because no action could have been brought against the parish, and that the Act of Parliament requiring the surveyor to keep the roads in repair was not passed for the purpose of creating a new liability, but simply in order to provide machinery whereby the duty of the parish to repair might be conveniently fulfilled.
>
> "This principle is equally applicable where the duties and liabilities of the surveyor have been transferred to other bodies, unless a distinct intention on the part of the Legislature can be inferred from the particular statute under consideration to create a new liability. This was laid down in 1870 in the case of *Gibson* v. *Mayor of Preston* (3), where the previous authorities were considered; and, unless this House is prepared to overrule that case, it governs the present. After careful attention to the arguments which have been addressed to your Lordships, I adhere to the judgment given in the case of *Gibson* v. *Mayor of Preston* (3), and I therefore think that the judgment appealed from should be affirmed."

On this question there is really an accumulation of authority. Perhaps I should refer to two other cases. The first is *The Municipality of Pictou* v. *Geldert* (4). As in the present case, the injury there complained of arose through a bridge being out of repair. The case was decided before the Judicial Committee of the Privy Council, consisting of Judges of the very highest eminence. It was held in that case that public corporations, to which an obligation to keep public roads and bridges in repair had been

(1) [1892] App. Cas. 345.
(2) 7 H. & N. 760; 2 H. & C. 197.
(3) L. R. 5 Q. B. 218.
(4) [1893] App. Cas. 524.

transferred by Act of Parliament, were not liable to an action in respect of mere non-feasance, unless the Legislature had shown an intention to impose such liability upon them. Lord Hobhouse, in delivering the unanimous judgment of the Privy Council, said :—

> "By the common law of England, which is also that of Nova Scotia, public bodies charged with the duty of keeping public roads and bridges in repair and liable to indictment for a breach of this duty, were, nevertheless, not liable to an action at the suit of a person who had suffered injury from their failure to keep the roads and bridges in proper repair. . . . The latest English case is *Cowley* v. *Newmarket Local Board* (1), decided in the House of Lords. It must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable in an action in respect of mere non-feasance. In order to establish such liability it must be shown that the Legislature has used language indicating an intention that this liability shall be imposed."

To the same effect is the language of Lord Herschell in *The Municipal Council of Sydney* v. *Bourke* (2). I quote one passage—

> "In the series of cases ending with *Cowley* v. *Newmarket Local Board* (1), in which it was held that an action would not lie for non-repair of a highway, the duty to repair was unquestionable, and it was equally clear that those guilty of a breach of this duty rendered themselves liable to penal proceedings by indictment or otherwise. The only question in controversy was whether an action could be maintained, the ground upon which it was held that it could not—even where the duty of keeping the roads in repair had been in express terms imposed on a corporate body—was that it had long been settled that though a duty to repair resting on the inhabitants subjected them to indictment in case of its breach, they could not be sued, and that there was nothing to show that the Legislature in transferring the duty to a corporate body had intended to change the nature or extent of their liability."

All these cases plainly show that there can be no doubt as to the law. Non-feasance affords no ground for civil redress. I have already referred to the facts, from which it appears that there is here no evidence of any act of commission, nothing but non-feasance as distinguished from misfeasance. The question

(1) [1892] App. Cas. 345. (2) [1895] App. Cas. 433.

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remains is there anything in the Local Government Act of 1898 to make the defendants liable in damages for mere non-feasance at the suit of a private person? In determining this we must regard the purview of the legislation and the language used in the Act. By the 4th section of the Act of 1898 the business of the grand jury and of presentment sessions for the county at large were transferred to the county council; and by the 82nd section, upon which the question I am now discussing principally depends, it is provided, in sub-section 1, that it shall be the duty of every county and district council, according to their respective powers, to keep all public works maintainable at the cost of their county or district in good condition and repair, and to take all steps necessary for that purpose. The definition of "public work" would include the road and bridge in question. By the 3rd sub-section of section 82 if the county council fail to discharge their duty, the Local Government Board may, on complaint of the district council, interfere, and, *vice versa*, if the district council fail to discharge their duty, the county council may appeal to the Local Government Board, and the Board may make an order limiting a time within which the necessary work or repairs, as the case may be, shall be done, and directing such work or repairs to be done; and their order may be enforced by mandamus under section 15 of the Public Health Act, 1878, which is incorporated by section 82, sub-section 3.

These are the relevant sections of the Act of 1898 upon this question of added liability. Do they impose any liability for damages arising from non-feasance? Before the passing of the Act of 1898 the grand jury were not liable, nor was the county surveyor liable, for non-feasance; and I think all the reasoning which established the immunity of the grand jury and of the county surveyor prior to 1898 is equally applicable to the county council created by that Act. They could not be responsible in their personal capacity. No one would act as a county councillor were so serious a responsibility attached to the office. They are not sued here in their personal capacity, and the reasons which obtained in the case of *Russell* v. *The Men of Devon* (1) is equally

(1) 2 T. R. 667.

applicable here: "*car est populus et surra reforme per presentment*," which it is stated must be understood to mean that, as the road ought to be repaired by the public, no individual can maintain an action against them for the consequences arising from their neglect.

The county council represents the public, and the imposition on them of the duty to maintain and repair the roads and bridges of their county is merely the creation and establishment of a means and machinery by which that duty can be enforced. Roads must be maintained and repaired, and it is expedient in the public interests that the work should be done by some one; and the council of the county are declared to be the body which can be compelled by mandamus to do it. In regard particularly to such a body as a county council, the reason for non-liability to damages for non-feasance given by Lord Justice James, and cited with so much approval by Lord Herschell in *Cowley's Case* (1) is plainly applicable. Lord Herschell says:—

> "In the case of *Glossop* v. *Heston and Isleworth Local Board* (2), James, L.J., made some observations bearing on this point, which seem to me to be of great weight. In that case the plaintiff claimed an injunction to restrain a nuisance on the ground that the defendants had neglected to perform the statutory duty cast on them as the sanitary authority of a particular district. The learned Lord Justice said: 'It appears to me that if this action could be sustained, it would be a very serious matter indeed for every ratepayer in England in any district in which there is any local authority upon whom duties are cast for the benefit of the locality. If this action could be maintained, I do not see why it could not, in a similar manner, be maintained by every owner of land in that district who could allege that if there had been a proper system of sewage his property would have been very much improved.'"

It is not, however, to be lost sight of that Lord Hershell, in giving judgment in the case of *The Municipal Council of Sydney* v. *Bourke* (3), when referring to the case of *The Municipality of*

(1) [1892] App. Cas. p. 352. (2) 12 Ch. D. 102, 109.
(3) [1895] App. Cas. 433, 444.

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Pictou v. *Geldert* (1) said that a passage in the judgment in the latter case was very relevant. The passage is—

> "It is to be observed further that the statute does not in terms impose any obligation upon the municipality to repair the roads or bridges. It confers upon the council powers and authorities which extend to those objects; but the powers and authorities are conferred in precisely the same terms with reference to objects with regard to which the powers clearly must be discretionary and not matters of obligation. In the opinion of their Lordships, it is impossible to find in any of the legislative provisions the indication of an intention on the part of the Legislature that a person injured by the mere non-repair of a road or bridge should be entitled to sue the municipality for damages in respect thereof."

Now, it is quite true that the 82nd section of the Local Government (Ireland) Act, 1898, expressly, and in so many words, says that it shall be the duty of the county council, according to its powers, to keep all roads and bridges in repair; but in my opinion this express declaration as to their duty was inserted in the section solely with the view of removing all question of discretion, and of securing that the public duty of maintaining roads should be fulfilled, and its fulfilment made enforceable by mandamus—with the view, in fine, of making it clear that a county council, if it failed to perform its duty, could be reached by mandamus under the incorporated provisions of the Public Health Act, and not with a view of creating an added liability, in the case of mere non-feasance, to civil redress for damages.

For these reasons, I am of opinion that judgment should be entered for the defendants, inasmuch as the evidence produced at the trial only disclosed non-feasance and mere omission on the defendants' part, and the statute has not imposed any superadded liability upon them.

JOHNSON, J.:—

In this action the plaintiff sues the defendants (the county council of county Armagh) for damages for injuries he sustained in consequence of a public county road, which, where the

(1) [1893] App. Cas. 524.

occurrence out of which the alleged cause of action arose, crossed a small stream by an old stone bridge or culvert, part of the structure of the high road, was out of repair and a public nuisance, by the neglect and breach of duty on the part of the county council (since the Local Government (Ireland) Act, 1898, came into operation) to maintain and keep this public highway in a state of repair, reasonably safe for public traffic. The county council had given this road and bridge into the charge of the county surveyor because no sufficient contractor could be had (1). From whatever point of view the consideration of this case is approached, in the result it is an action by an individual for damages against the county council, the public authority, whose duty it is to keep this highway in repair, not for misfeasance in anything they have done in or about such repair, but for non-feasance in omitting to maintain and keep the highway in a proper state of repair, and I think it is clear and settled law that a public road authority, unincorporate or corporate, whose duty by the common or statute law it is to keep a public highway in repair, and who may be compelled to do so by the appropriate proceedings for this purpose, is not liable to such an action as the present one, even though their omission is a public nuisance. I do not stop to consider the evidence; the absence of any notice or a knowledge of defect in the bridge; the questions left to the jury, or their findings; because counsel for the defendants, without contesting these findings, contend, as they did at the trial, on the broad ground that the defendants are not liable in this action to the plaintiff either at common law or by statute. This is the question for decision, and is of far-reaching importance, inasmuch as it affects every county council and every ratepayer in Ireland.

The maintenance and repair of public highways and bridges, with which alone we are now concerned, and to which my judgment is confined, has from early times been a distinct branch of the law in England and Ireland, and originated similarly in each country. Coke, treating of repair of bridges, highways, &c., says (2) :—

> "Of common right all the country shall be charged to the reparation of a bridge: and therewith agreeth, 10 Ed. 3, 28 *b*, that a bridge

(1) Order in Council, 30th January, 1899, Article 24. (2) 13 Co. 33.

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shall be levied by the whole country, because it is a common easement for the whole country; and as to that point the statute of 22 H. 8, c. 5, was put in affirmance of the common law . . . So it is of a highway; all the country ought of common right to repair it, because that the country have the ease and passage by it which stands with the reason of the case of the bridge."

From this it followed that an individual injured by the non-repair of a public highway or bridge could not in law have an action for damages for injury by the non-repair: Bro. Abr. Tit. Accion sur le Case, pl. 93; 5 Ed. 4 (1465).

> "If a highway be out of repair by which my horse '*est mire*,' no action lies against whoever ought to repair it, *car est populus, et surra reforme pur presentment.*"

"*Mire*" is usually translated "mired," but I understand it to mean bogged in a soft part of the highway, out of repair and not safe for public traffic. As to the last words, Lord Halsbury, adopting the argument of counsel in *Russell* v. *The Men Dwelling in Devon* (1), says in *Cowley* v. *The Newmarket Board* (2), that they

> "must be understood to mean that as the road ought to be repaired by the public no individual can maintain an action against them for any injury arising from their neglect."

The stat. 22 H. 8., c. 5 (1530), Tit. "For Bridges and Highways" (3), to which Coke refers, imposed the repairs of bridges on highways (not being in a city or town corporate) on the inhabitants of the shire or riding within which the decayed bridge happened to be. Thus in England the county was *prima facie* liable to repair all bridges out of repair on highways within it, unless the county could show that others ought to repair them by reason of some consideration (such as the right to take toll), or because they were bound to repair *ratione tenuræ* or by prescription (4).

(1) 2 T. R. 667.
(2) [1892] App. Cas. 345, at p. 350.
(3) 2 Ruff. Statt. at Large, 153.
(4) See 2 Inst. 696.

In Ireland the 11, 12, and 13 Jac. 1, c. 7 (Ir.) (1612), following the lines of the 2 & 3 Ph. & M. c. 8 (Eng.) (1555), imposed the maintenance and repair of highways on the parish, and required the constables and churchwardens of every parish yearly at Easter to convene the parishioners and choose two surveyors of the works for amendment of highways in the parish leading to any market town, and to appoint six days before the ensuing St. John's Day for the parishioners to amend the highways, and charged the occupier of every plough-land, or having a draft of horse or oxen, or a plough in the parish, or being a householder, cottier, or labourer (not being a yearly hired servant) in the parish, to supply the necessary horse and oxen work, labour, and tools for the purpose.

But the 10 Car. 1, Sess. 2, c. 26 (Ir.) (1634), following the lines of the 22 H. 8, c. 5 (Eng.), s. 1, imposed the maintenance of bridges on highways on and with the assent of the grand jury at the cost of the county or barony, and required the Judges of Assize and Justices in the general sessions of the peace to inquire of all manner of annoyances of bridges and causeways broken or decayed on the highways, and . . . to make such process upon every presentment before them respectively for the reformation thereof against such as ought to be charged for . . . amending such bridges or causeways as the Justices of the King's Bench used commonly to do, or as should seem by their discretion necessary and convenient for the speedy amendment thereof. And when it could not be proved what county, barony, city, borough, town, or parish, or person, or body, ought of right to repair such bridges or causeways (not being in a city or town corporate), then they should be repaired by the inhabitants of the shire or barony within which the bridges or causeways happened to be. Section 2 authorized the Justices of Assize and of the Peace, respectively, with the assent of the grand jury, to tax every inhabitant of the county or barony to such reasonable sum as they should think sufficient, and to appoint collectors of the tax and two surveyors to see every such bridge and causeway repaired from time to time, to whom the collectors should pay the moneys they received to be accounted for at the public sessions of the peace.

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Subsequent Acts enlarged the authority of grand juries to present for repairs of public highways, and the 5 Geo. 3, c. 14 (Ir.) repealed the previous Acts, put an end to the six days' labour, and empowered the grand jury to present at the assizes such sums as they should think fit on any barony or baronies in the county for repairing or making roads and for the wages of the overseers of such roads. This Act was subsequently repealed; and, in 1817, the 57 Geo. 3, c. 107, which appears to be the first general Act regulating the fiscal powers and authority of the grand jury and their presentments, subject to the fiat of the Judge of Assize, for county public works (including roads and bridges), superseded overseers of repairs of highways and bridges by creating, sect. 7, the office of county surveyor, appointed by the Lord Lieutenant, sworn into office by the foreman in presence of the other members of the grand jury, and whose salary was paid by grand jury presentment at each assizes; his duties were prescribed by the statute, and he was bound to attend at every assizes, to be examined on oath or otherwise by "the Court of Grand Jury" on all or any matters touching the execution of his office. The grand jury thus became the statutory local authority on behalf of the county and baronies charged with the admininistration of the fiscal business of the county and, by their officer the county surveyor, with (amongst other public duties) the care and condition of the county roads and bridges. The grand jury was not incorporated —its members summoned for each assizes were as changeable as the inhabitants of the county in whose place and on whose behalf they were required to perform the duty (amongst others) of keeping the county roads and bridges in repair; but no action for damages was or could be maintained against a grand jury for omission to perform that duty any more than against the inhabitants of the county on whose behalf the duty was imposed on them. The immunity of the inhabitants of the county from such an action for omission to repair was decided in *Russell* v. *The Men Dwelling in the County of Devon* (1), in which the plaintiff sued the defendants for injuries to his wagon in consequence of a bridge on the highway which the county was bound to keep in repair being

(1) 2 T. R. 667.

out of repair. Two of the inhabitants of the county, on behalf of themselves and the other inhabitants appeared, and demurred, and it was decided that the action was not maintainable on the grounds (1) that the county was not incorporated, and (2) on the broad ground, following the authority in Bro. Abr. (*supra*). The first ground was removed by the 43 Geo. 3, c. 59, which (in England) provided that the inhabitants of counties might be sued in the name of their surveyor. I am not aware of any statute in Ireland providing that the inhabitants of a county or members of a grand jury might be sued in the name of their county surveyor; but, notwithstanding the 43 Geo. 3, c. 59, the immunity of the inhabitants of the county from action for omission to repair a highway or bridge continued to them, and their officer, the county surveyor, as was decided in *M'Kinnon* v. *Penson* (1), where an action was brought against the county surveyor of the county of Cardigan, and the declaration averred that the inhabitants of the county wrongfully, unlawfully, and negligently permitted a public bridge to become and be so ruinous and in decay that the plaintiff's carriage and servant were precipitated from it into the water. Pollock, C.B., p. 321, says :—

> "It seems to me the Legislature never intended by that statute (43 Geo. 3) to create a new liability, but only to afford a more convenient remedy when they (the council) were liable."

And it was decided that the action was not maintainable either at common law or under the statute (43 Geo. 3). The judgment of the Court in that case is in terms apposite to the present. The Chief Baron says, p. 329 :—

> "Had the intention of the Legislature been to constitute a new liability on counties to which they were not liable by common law, and so to provide a remedy for individuals who suffer by their default, the obvious course would have been to recite the grievance and provide for the remedy in express terms. Nothing equivalent to this is done, and there is nothing to lead me to believe that this supposed defect of justice was in their contemplation at all."

These authorities, and the pl. in Bro. Abr., are approved and

(1) 8 Exch. 319 (1853); affirmed 9 Exch. 609.

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acted on by the House of Lords in *Cowley* v. *The Newmarket Local Board* (1). The purpose of the Grand Jury Act, 5 & 6 Wm. 4, c. 116, was to facilitate the transaction of county business by consolidating, regulating, and amending the fiscal powers of grand juries, whom it authorized to provide by presentment for (amongst other public duties) the repair of the county highways and bridges by contract, subject to the supervision of the county surveyor, and by the Amending Act, 20 & 21 Vict., c. 15 (1857), where no proposal was made or accepted, to direct the county surveyor to execute the work—as the county council is empowered (2), if no sufficient contractor can be found, to give the work into the charge of the county surveyor, as they did in the present case; but it seems to me that, so far as the omission to repair county roads or bridges is concerned, in other words, in respect of such non-feasance as in the present case, the Legislature did not by the Acts of 1836 or 1857, or either of them, distinctly or at all express any intention to impose, through their public officer, the county surveyor, or otherwise, on the inhabitants of the county or baronies, or on the grand jury acting on behalf of the county, any more extensive or other liability than that to which they were theretofore subject. In England the authorities show that the same immunity attached to an incorporated vestry in a city, a body elected by the ratepayers in and representing the parish. In *M'Mahon* v. *Carroll* (3) the entry in the registrar's note-book on the appeal in this case is:—"Affirmed. Appeal dismissed with costs. Held, action did not lie under the special circumstances of the case." In *Parsons* v. *The Vestry of St. Mathew, Bethnal Green* (4), the vestry was incorporated and charged with the duty of repairing the highways in the parish, which, therefore, was the duty of the parish. The declaration averred that the defendants wrongfully permitted and suffered a highway to be and continue out of repair and dangerous, whereby plaintiff's horse tripped and was injured: on demurrer it was held that the action was not maintainable. Willes, J., p. 59, says:—

"The defendants are a parish body elected under the Act (18 & 19

(1) [1892] App. Cas. 345. (2) Order in Council, 30th Jan., 1899, Art. 24.
(3) Brett's G. J. Laws, 2nd Ed. 23. (4) L. R. 3 C. P. 56.

Vict. c. 120), which in effect provided, for the convenience of the parish, that they shall perform the duties previously performed by the surveyor of highways, and pay the expenses thereby incurred by rates which they are authorized to raise. They must act in this either as officers of the parish, and then the parish must answer as principals for the neglect of these duties, and *Young* v. *Davis* (1) is an express authority that the officers are not liable; or else they must act as representatives of the parish, and then their liability will be a reflection of the liability which they represent, and against the parish no such action as this could be brought. On either supposition then no action will lie against them for mere non-feasance, such as is the ground of the present action."

The same immunity attached to Local Boards and such like bodies. In *Gibson* v. *The Mayor of Preston* (2), the defendants were the Local Board of Health. The declaration averred that the defendants wrongfully permitted a public footway which it was their duty to repair to be and remain so ruinous and out of repair that plaintiff was thereby thrown down and broke his leg. This footway was a public highway which had been repairable by the parish, and the Public Health Act, 1848, enacted that it should vest in and be under the management and control of the Local Board of Health, which "shall cause same to be levelled and repaired as and when occasion shall require." On demurrer it was held that no such action could have been maintained before the Act against the parish for non-repair of the highway, and that the Legislature had not distinctly shown by the Act an intention to impose such a liability on the Local Board. That case was approved of by the House of Lords in *Cowley* v. *The Newmarket Local Board* (3), which appears to me to have definitely settled the law on the point and to cover the present case. There a highway was vested in the defendants as the urban authority under the Public Health Act, 1875, and their statutory duty was from time to time to level, alter, and repair the highway as occasion should require. Many years before the plaintiff's accident the owner of property adjoining the public footpath, part of the highway, made a sloping entrance to his premises by cutting through this footway and building dwarf retaining walls against each end of the intersected footway, leaving a drop of about

(1) 7 H. & N. 760; in error 2 H & C. 197.
(2) L. R. 5 Q. B. 218. (3) [1892] App. Cas. 345.

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18 inches between the dwarf walls. The place was not lighted, although the defendants had authority to light it and make it safe for the public. The plaintiff on a dark night walking on the footway fell into this drop between the two dwarf walls, and was badly hurt. The alleged cause of action was that the defendants wilfully, negligently, and wrongfully, suffered and permitted this footway to be and continue out of repair and dangerous to foot passengers, in consequence of which the plaintiff sustained injury. At the trial, before Denman, J., the jury found that the defendants were guilty of negligence in leaving the retaining walls as they were, instead of levelling the footpath and also in not sufficiently lighting the place, and assessed the damages at £200. Denman, J., entered judgment for the defendants (1). The Court of Appeal (2) affirmed this judgment on the ground that what was complained of was omission (non-feasance), and not commission (misfeasance). The House of Lords affirmed the Court of Appeal; and, in giving the judgment of the House in *The Municipal Council of Sydney* v. *Bourke* (3), Lord Herschell states the ground and effect of the decision in *Cowley's Case* (4) thus—

> "In the series of cases ending with *Cowley* v. *The Newmarket Local Board* (4), in which it has been held that an action would not lie for the non-repair of a highway, the duty to repair was unquestionable, and it was equally clear that those guilty of a breach of this duty rendered themselves liable to personal proceedings by indictment or otherwise. The only question in controversy was whether an action could be maintained. The ground upon which it was held it could not—even where the duty of keeping the roads in repair had been in express terms imposed by statute on a corporate body—was that it had long been settled that though a duty to repair resting on the inhabitants, subjected them to indictment in case of its breach, they could not be sued, and that there was nothing to show that the Legislature in transferring the duty to a corporate body had intended to change the nature or extent of their liability."

And in *The Municipal Council of Sydney* v. *Bourke* (3) it was held that an action did not lie against the Sydney Council in consequence of their allowing a highway vested in them, and which it

(1) 6 T. L. R. 321.
(2) 7 T. L. R. 29.
(3) [1895] App. Cas. 433.
(4) [1892] App. Cas. 345.

was their duty to repair, to become out of repair, whereby a man was thrown from his van and killed, although that duty was for the first time imposed on the council by statute, which provided that—

> "All public ways in the city of Sydney now or hereafter formed shall be vested in the council, who shall have full powers to alter, widen, level, divert, extend, construct, improve, maintain, repair, and order such public ways and the footpaths thereof."

The same question arose in *Thompson* v. *The Mayor of Brighton* (1), where the urban authority permitted the highway which was vested in them to be worn down below the level of the cover of a manhole originally lawfully constructed on a level with the surface of the highway, but which, by the neglect of the defendants to keep the highway in proper repair, projected above the surface of the highway and tripped up and injured the plaintiff's horse. The Court of Appeal held that no action lay against the defendants for their omission to keep the highway in repair. In arriving at that conclusion, Smith, L.J. (in whose judgment Lord Lindley, then Lord Justice, concurred), examines all the authorities, and Lord Davey, then Lord Justice, p. 344, says—

> "It may be conceded that the corporation is under a legal obligation to make such arrangements that works of whatever kind under their care shall not become a nuisance, but the question remains, in what respect have the corporation failed to discharge their legal obligation, and is there any right of action in respect of such default. Turn the case any way you will, it seems to me that you come back to the proposition that the breach of duty was in not repairing the highway, and for that no action will lie. Collins, L.J., in *Campbell Davis* v. *Lloyd* (2), says:—The difference between public nuisances arising by commission and those arising by omission is in the view of the law radical, since in the latter case, however clear and special the damage to the individual, he can maintain no action."

It seems to me, therefore, abundantly established that from the earliest time such an action as this, for damages for injury in

(1) [1894] 1 Q. B. 332. (2) [1901] 2 Ch. 518, at p. 525.

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consequence of omission to repair a public highway or bridge, could not be maintained by any individual against the inhabitants of a county or barony, or their officer, the county surveyor, and that where the county liability and the surveyor's duties were transferred by statute to a parish, vestry, incorporated local board, or other local corporate body or to a grand jury, both on principle and authority, the like immunity remained to them. The grand jury system for the maintenance and repair of county highways and bridges has been superseded by the present system established by the Local Government (Ireland) Act, 1898, and the Orders in Council thereunder, and the question is, has the present system imposed on the county council liability to action for damages by every person sustaining injury by the omission of the county council in repairing a public county road or bridge, given in charge to their officer, the county surveyor—a liability to which no county, barony, or grand jury, before the Local Government Act, 1898, was liable. This question is, as I have said, of grave and general importance: it affects every county council and every ratepayer in Ireland. To create such a liability a legislative enactment in express and affirmative terms is necessary, which should distinctly show that the Legislature in transferring the duty to this corporate body intended to change the nature and extent of their liability. The Act of 1898, in place of the grand jury, establishes a corporate county council elected by ratepayers to be entrusted—"With the management of the administrative and financial business of the county" (sect. 1); and, for the purpose of such business, sect. 4 transfers to the county council (with exceptions not material to the matter in hand) 'all the powers' (including, sect. 109, 'the rights, jurisdiction, capacities, privileges, and immunities'), 'and duties' (including, sect. 109, 'responsibilities, and obligations') 'of the grand jury in connexion with such business, and also such further powers and duties as are conferred on them by or in pursuance of the Act as may be necessary for conducting as an administrative body the powers hereby transferred.'"

This, then, is the purpose and scope of the Act, subject to such express enactments as are provided by or in pursuance of the Act, which (section 82), in terms neither more nor less imperative than

the statutory obligations of the defendants in the cases to which I have referred, enacts that—"It shall be the duty of every county and district council" (we are not now concerned with district councils) "according to their respective powers to keep all public works—which (sect. 109) 'means,' in the singular number, and which, therefore, we may take to be also in the plural number, 'means any road or work in respect of which under the Grand Jury Acts a presentment might but for this Act be made by any presentment sessions for a barony or county at large, and any grand jury'—maintainable at the cost of their county or district in good condition and repair, and to take all steps necessary for that purpose."

And section 82, sub-sect. 3 (which was considered in a recent case in this Court), provides an express and efficient remedy for default in discharge of this duty. I do not find anything in these enactments, nor have we been referred to any other provision in the Act, which shows affirmatively, expressly, or distinctly, or even at all, any intention of the Legislature to impose on the corporate county council or on the ratepayers whom they represent a new liability which did not previously exist at common law or by statute, for non-feasance—for omission to repair a county-road or bridge—as is contended for by the plaintiff in this action. But I do find that when the Legislature intends in this Act to impose on the ratepayer a new liability or to onerate him with another local burden which did not previously exist, it does so distinctly in express and affirmative terms, as, for instance, in section 5, by which is "transferred to the County Court the business of any presentment sessions and grand jury in relation to" (what it terms) "compensation for criminal injuries." I have not overlooked the *dicta* attributed to Lord Justice Fitz Gibbon in the civil bill appeal of *Russell* v. *The County Council of Wexford* (1), which have been brought to our notice, but it does not appear that those *dicta* were necessary to the decision of the learned Judge in that case. For these reasons I think the judgment should be entered for the defendants, notwithstanding the findings and verdict of the jury.

(1) 35 Ir. L. T. 78.

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GIBSON, J.:—

The claim in this action is founded on breach of duty to repair and negligence in repairing. There is no complaint of any act of commission. There are two questions for decision: What is the duty imposed on the county council by the statute of 1898, sections 4 and 82? and is actionable liability established on the evidence and findings of the jury?

According to a sequence of authorities from *M'Kinnon* v. *Penson* (1) down to *The Sydney Case* (2), it was settled law at the time the Act of 1898 was passed that a road authority was not liable in an action for omission to repair. This immunity did not depend on the incapacity of the county or parish to be sued. It extended to cases where the road authority was incorporated and subject to an express transferred obligation to repair. *Cowley's Case* (3), *Hartnall's Case* (4), and *Ohrby's Case* (5), must now be regarded as authorities to the same effect, as it is now clear that they should have been decided in favour of the defendants.

This exemption from liability is referred to the principle laid down in Brooke, that, as the highway ought to be repaired by the public, an injury from neglect cannot be the subject of action, but is only ground for the Crown interfering: *Russell's Case* (6), *M'Kinnon's Case* (7), and *Gibson's Case* (8). Another form of the same explanation occurs in *Cowley's Case* (3) and subsequent authorities, namely, that the duty to repair is to the public, and not to an individual, in accordance with the reasoning in *Atkinson's Case* (9) and *Robinson's Case* (10). *Saunders' Case* (11), though distinguishable, illustrates this principle.

Though the inhabitants of a county, parish, or township could not be sued, they were indictable, if bound to repair, for not repairing. This was old and familiar settled law (12).

(1) 8 Ex. 319 (1853).
(2) [1895] App. Cas. 433.
(3) [1892] App. Cas. 345.
(4) 4 B. & S. 361.
(5) 5 B. & S. 743.
(6) 2 T. R. 667.
(7) 8 Ex at p. 321.
(8) L. R. 5 Q. B. at p. 221.
(9) 2 Ex. Div. 441.
(10) [1897] 1 Q. B. at p. 621.
(11) [1897] 1 Q. B. 64.
(12) 4 B. & Ald. 469; 16 Q.B. 109.

The law in Ireland previous to 1898 is stated by Palles, C.B., in *M'Mahon* v. *Carroll* (1), reported by Mr. Brett. See also *Campbell* v. *Tate* (2).

In England and Ireland alike, in case of acts of commission, the person or corporation guilty of the wrong could be impleaded by any one thereby injured.

This being the existing state of the law, had it been the intention of Parliament to make a radical change by giving a right of action to individuals where none existed before, the obvious course would have been (as Pollock, C.B., remarks in *M'Kinnon's Case* (3)) to recite the grievance and provide for the remedy in express terms. The statute, however, does nothing of the kind. It operates by way of transfer: *Cowley's Case* (4).

No doubt, incidentally, as the result of incorporation, the council are subject to a liability from which the county and grand jury were previously free.

The duty imposed on the county or district council by section 82 is under sub-section 3 enforced specifically by appeal to the Local Government Board, which takes the place of the appeal to the Lord Lieutenant under section 64 of the Grand Jury Act; and the new body as a corporation are liable to indictment and possibly mandamus, as well as for torts committed by their servants, but I can find no intention expressed to create a wholly novel species of liability. The council as new statutory road authority appear to me to enjoy the same immunity for default as the incorporated road authorities in the English cases, of which it must be taken that the Legislature was aware when framing the statute.

Assuming that the defendants are not made liable by the statute for non-feasance, can the plaintiff recover on the evidence and findings of the jury? What is the meaning of non-feasance and misfeasance?

Does the non-feasance for which a road authority is not liable extend to negligent omission? The cases supply no uncertain answer. In *M'Kinnon's Case* (5) the surveyor, as representing

(1) Brett G. J. Laws (2nd Ed.) 23.
(2) I. R. C. L. 193.
(3) 8 Ex. at p. 329.
(4) [1892] App. Cas. 345.
(5) 8 Ex. 319 (1853).

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the county under 43 Geo. 3, c. 59, sect. 4, was sued for negligently permitting a bridge to remain ruinous and in decay, though a reasonable time to repair it had elapsed, whereby the plaintiff's servant was thrown, together with the carriage he was driving in, into the water and injured. In *Young* v. *Davis* (1) the surveyor was sued under the Highway Act, 5 & 6 Wm. 4, c. 50, for negligently permitting a highway to be founderous and dangerous, and for suffering a dangerous hole therein to be unfenced and unlit after daylight had ceased. It appears that before the accident notice had been given of the existence of the hole (2).

The following cases refer to incorporated road authorities. In *Hartnall's Case* (3) (which it must now be taken should have been decided in favour of the defendants) the complaint was for wrongfully suffering a footpath to be out of repair and dangerous, for negligently permitting a kerbstone to be at the end of the footway so as to be dangerous, and for leaving the footpath after daylight had ceased without sufficient light to show its dangerous state. *Ohrby's Case* (4) similarly was for wrongfully and negligently omitting to fence and light a dangerous pathway. In *Gibson's Case* (5) the action was for wrongfully permitting a public footway to be out of repair and dangerous. The complaint in *Cowley's Case* (6) was for wilful, wrongful, and negligent conduct (including omission to guard and light) in permitting a footpath to be out of repair and dangerous. The verdict found the defendants guilty of negligence. *Geldert's Case* (7) was founded on negligence in suffering a bridge and its approaches to become out of repair and dangerous. *Thompson's Case and Oliver's Case* (8) disclosed negligence of a very culpable character. As sanitary authority the defendants had put a manhole into a sewer in a highway. The manhole was in good repair, but in their character of road authority the defendants had allowed the road to get worn away below the level of the manhole, which

(1) 7 H. & N. 760; 2 H. & C. 197.
(2) 7 H. & N. p. 762.
(3) 4 B & S. 361.
(4) 5 B. & S. 743.
(5) L. R. 5 Q. B. 218.
(6) [1892] App. Cas. 345.
(7) [1893] App. Cas. 524.
(8) [1894] 1 Q. B. 332.

thus projected, and was obviously a dangerous obstruction. *Bourke's Case* (1) was for negligence in allowing a street to fall into disrepair, heavy rain and traffic for some days previous to the accident having caused holes in the road.

These cases, which were all determined adversely to the right of action, conclusively establish that the non-feasance for which a road authority is not liable to be sued covers negligence, and negligence of a flagrant character.

So far, therefore, as negligent non-feasance is concerned, the action cannot be maintained.

I now turn to misfeasance. No such case is made in the pleadings, nor is it supported by the findings. Is it shown by the evidence?

The defendants did not construct the bridge, and it is out of the question to visit upon present ratepayers faults (if any) of construction of their predecessors years before when the grand jury was road authority. See the judgment of Coleridge, J., in the Exchequer Chamber in *M'Kinnon's Case* (2). The existing roads in their then state were transferred with a duty to maintain and repair, but previous misfeasance of the grand jury and its staff cannot be imputed to the newly constituted road authority.

This was hardly questioned, but counsel argued that what the jury found amounted to misfeasance.

If the defendants knew or ought to have known that the bridge was insufficient for the requirements of existing traffic, it is said that the omission to repair is not mere negligence, but is affirmative misfeasance.

This cannot be so. Negligence is a negative term: *Grill's Case* (3); and means only the absence of due and ordinary care. If the defendants did not know, and had not the means of knowing, the dangerous condition of the bridge, they would not have been guilty of negligence at all. It never occurred to counsel or the Court in any of the cases (some of which disclose negligence of a gross character) that by a slight change in pleading language a good cause of action would have been established.

(1) [1895] App. Cas. 433. (2) 9 Ex. at p. 614.
(3) L. R. 1 C. P. at p. 612.

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All negligence may in a sense be described as misconduct, but it remains neglect of duty and not an act of commission. The difference between the two is (as Collins, L.J., says in *Davys* v. *Lloyd* (1)) radical. It was there argued that there was no distinction between a road impassable from neglect to repair and a road impassable through misfeasance, and that the same right of abating nuisance applied. The Court of Appeal, however, held the contrary.

Counsel next contend that the bridge was a trap, and that defendants invited the plaintiff to use it. This argument (which was advanced in *Cowley's Case* (2) (see p. 348) without success) is inconsistent with the decided cases. A road authority is not like the owner of a shop, whose customers are invited to enter it. The public use the roads as of right without any invitation. The bridge was no more a trap than the dangerous holes and obstructions disclosed in the authorities that I have referred to.

It was, lastly, strenuously urged that the defendants acted wilfully with their eyes open to a palpable danger, and that, wilfully declining to perform their duty, they were guilty of misfeasance. There are several answers to this. The word "wilful" does not occur in the pleading or in the questions put to the jury. Nor is there evidence to support wilful default, if that would legally improve the plaintiff's position.

The council held their first meeting some time after April, 1899, and they had many miles of road with numerous bridges placed under their care. No complaint was ever made to them that the bridge was insufficient. The surface man did not notice the sinking of the road, which first occurred the day before the accident. There may have been negligence, but there was nothing wilful about it.

Even if there was wilful or reckless negligence, even though the council might be indictable, it is not easy to see how this could be deemed to be misfeasance. No such contention was advanced in any of the cases, though in some of them the negligence seemed more like wilful default than anything here proved against the defendants. If negligence is omission to use

(1) [1901] 2 Ch. at p. 525. (2) [1893] App. Cas. 345.

due care, the addition of "wilful" to the omission can hardly turn a negative into a positive term, and make omission equivalent to commission. However, the question does not properly arise for decision in this case, as the pleadings, course of the trial, and evidence, put forward no such issue.

The authorities in reference to acts of commission imposing liability on a road authority are all distinguishable. In each of them there was either defective construction for which such authority was to blame, or there was an affirmative act done. The *Bathurst Case* (1) (much of the reasoning in which has been overruled as unsound) has been explained as depending on this principle. The bridge here was a necessary part of the highway, and was not constructed by the council.

I do not deem it necessary to discuss authorities relating to sewers or other artificial works carried out under statutory powers, as to which see *Robinson's Case* (2), as the law as to roads stands on a special footing. Nor is it worth while to discuss minor points of fact or law on which authorities might be distinguished. I go upon the broad principle, which the decisions seem to affirm, that a road authority, maintaining highways for the public out of rates, cannot be sued by an individual in an action for negligence in performing an ordinary statutory duty to repair. To some it may seem hard that one injured by neglect of the council should have no redress by action. On the other hand, there is force in the view of Pollock, C.B., and his colleagues in *Young's Case* (3), that, if an action lies, there would be endless litigation; every accident occurring on the road would give rise to an action, and as roads are not usually in perfect repair, negligence would be always easy to allege, so that the general body of ratepayers would become insurers. If Parliament wanted to make the change, why did it not clearly say so? In many respects persons using roads occupy, under the Act of 1898, a more advantageous position than they did under the old grand jury system. A grand jury was not subject to indictment or mandamus, and it could not be sued for misfeasance. A council is not only

(1) 4 A. C. 256. (2) [1897] 1 Q. B. 619.
(3) 7 H. & N. at pp. 770, 773, 776.

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subject to the control of the Local Government Board on appeal, but it can be indicted; possibly compelled to do its duty by mandamus: *Reg.* v. *Dundalk Commissioners* (1); and can be made responsible in damages for torts committed by it. But in my opinion, though the entire community must suffer from the disrepair of highways, the default of the county representatives does not entitle any individual member of the public to recover damages at the expense of the ratepayers. The council is put by Parliament in the place of the grand jury, but the transfer is not made subject to a new and dangerous liability on the part of the ratepayers for the default of their representatives.

No point was raised as to which council, the county or the district, both mentioned in section 82, would be liable if the action lay, and I do not therefore discuss it.

Solicitors for plaintiff: *Carleton, Atkinson, & Sloan.*
Solicitor for defendants: *H. J. Harris.*

A. E. R. J.

(1) 2 L. R. Ir. 440; but see 12 A. & E. 427.

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Food and Drugs Acts, 1875, 1899 (38 & 39 *Vict. c.* 13; 62 & 63 *Vict. c.* 51) —*Summary jurisdiction—Right of local inspector to prosecute for penalties in his own name.*

Where, under section 2 of the Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), the Local Government Board, or Board of Agriculture, through their officer, procure samples of an article of food (*e.g.* margarine) for analysis, and communicate the certified result of the analysis, when made, to the secretary of the local authority, the secretary of the local authority may, without any special resolution, transmit such certificate to the inspector appointed under the Food and Drugs Act of 1875; and he without antecedent authorization may proceed in his own name to prosecute for any penalties to which the vendor may be liable.

CASE STATED.

At Bray Petty Sessions on the 4th January, 1902, the defendant, Thomas Butler, was charged upon three complaints alleging—

"(1). That on 12th November, 1901, at Main-street, Bray, county Wicklow, he, the said defendant, did unlawfully refuse to sell an article of food, namely, butter, to one Patrick Duignan, an inspector of food and drugs, who applied to purchase said article of food exposed for sale by retail in his shop, and who tendered the price of the quantity which he required for the purpose of analysis.

"(2). And that on the 12th November, 1901, at Main-street, Bray, county Wicklow, he, the said defendant, having exposed margarine for sale by retail did fail or neglect to attach to each parcel so exposed and in such manner as to be clearly visible to the purchaser a label marked in printed capital letters not less than one-and-a-half inches square the word 'margarine,' contrary to the statute in such cases made and provided.

"(3). And that on the 12th day of November, 1901, at Main-street, Bray, county Wicklow, he, the said defendant, having sold margarine by retail, the same not being in a package duly branded

(1) Before LORD O'BRIEN, L.C.J., and GIBSON, MADDEN, and KENNY, JJ.

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or durably marked, did not deliver said margarine to the purchaser in a paper wrapper marked with capital block letters not less than half an inch long and distinctly legible with the word 'margarine,' contrary to the statute in such cases made and provided."

Upon the hearing the Justices made the following orders :—

On the first summons, "No jurisdiction, summons having been issued without direction of the local authority, and in the name of the inspector of food and drugs to the local authority, who did not seek to purchase the articles of food ; *and on each of the second and third summonses*, "No jurisdiction, summons having been issued without the direction of the local authority and in the name of the inspector of food and drugs to the local authority, who did not take the samples."

On the application of the complainant the Justices stated the present case.

At the hearing of the summonses, Patrick Duignan, an inspector of the Department of Agriculture and Technical Instruction for Ireland, proved having visited the grocery and provision shop of the defendant, No. 2, Main-street, Bray, on the 12th November, and the happening of the facts alleged in the three summonses, and that, having on the same day ultimately procured from the defendant for analysis a sample of a butter-like substance, he divided same into four parts and dealt with three of such parts in the manner directed by section 14 of the Sale of Food and Drugs Act, 1875, as amended by 62 & 63 Vict. c. 51, and sent the fourth part to the Board of Agriculture.

The following facts were admitted by both complainant and defendant :—

1. That the Board of Agriculture communicated the result of the analysis of said sample to the secretary of the county council (the local authority) on the 4th of December, 1901.

2. That the next meeting of the county council was held on the 9th day of December, when the result of the analysis was for the first time brought before them, and that at that meeting the following resolution was passed :—"Resolved—That the report on margarine offences be sent to our inspector in Bray to deal with."

3. That the complainant was the inspector of food and drugs under the local authority.

4. That the summonses were issued on the 6th December, 1901.

In view of the opinion of the magistrates no evidence on the part of the defendant was tendered.

It was contended on the part of the complainant that when a constable prosecuted for adulteration it was not necessary to prove that he was directed by the local authority to prosecute: *Hale* v. *Cole* (1); that the local authority had appointed an inspector and given him full authority to take all necessary proceedings to enforce the Adulteration of Foods Acts, and that it was only through him that they caused any analysis to be made; that as a duty was cast on the local authority, communication to the secretary was communication to the authority; and that on communication of the result of the analysis to the secretary of the local authority, the local authority were in the same position as to taking proceedings as if the analysis had been procured by their inspector, as they acted through him in these matters.

On the part of the defendant it was contended that on the date of issuing the summonses (6th December, 1901), the county council had not authorized the proceedings to be taken, and had not had the result of the analysis before them; that therefore the summonses could not be maintained (62 & 63 Vict. c. 51, s. 2, ss. 1, 1*a*, and 2); that communication of the result of the analysis to the secretary could not be communication to the local authority, as the local authority had a discretion as to whether they would proceed or not; and if they desired to proceed they must by resolution thereupon cause proceedings to be taken; that an inspector for the local authority taking proceedings under the Act of 1875 did not do so by reason of any general delegation of authority, but because he was the person causing the analysis to be made: 38 & 39 Vict. c. 13, s. 20; that in fact there had been no general delegation of authority to the complainant, and that the resolution of the local authority of the 9th December was in itself bad in law and inoperative, as it should have been an express direction to cause proceedings to be taken in the name of the local authority; that the prosecutor in these cases was not the person causing the

(1) 55 J. P. 376.

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analysis to be made; that by section 2, sub-section 2, the prosecutor should be the county council; and that therefore the summonses were all bad in law.

The Justices stated that they were of opinion that at the date of the issuing of the summonses, the county council as local authority had not caused proceedings to be taken, inasmuch as the result of the analysis was not placed before a meeting of the council until the 9th December; further, that the complainant (an inspector of food and drugs under the local authority), not being the person causing the analysis to be made (38 & 39 Vict. c. 63, s. 20), could not maintain any of the summonses in his name, and accordingly decided against the complainant, at whose request they now stated the present case for the opinion of the Court, as to whether they were correct in point of law in their determination or as to what should be done in the premises.

C. Atkinson, and *The Solicitor-General* (*Campbell, K.C.*), for the complainant and appellant.

W. G. Gibson, and *Wakely, K.C.*, for the respondent.

Cur. adv. vult.

Feb. 27.

LORD O'BRIEN, L.C.J. :—

As to the first summons there is no difficulty. The offence charged is one against the public in general, and any member of the public may prosecute; and there is nothing in the statutes under consideration that makes the present prosecutor incompetent to prefer these charges. Upon this point we are bound by, and adopt, the judgment of the Lord Chief Baron in *Kenealy* v. *O'Keeffe* (1).

As to the second and third summonses, a question of some difficulty arises, by reason of the fact that the Parliamentary draftsman appears to have made no provision, in any clear and appropriate language, so that the two Acts of 1875 and 1899 might be put in force and worked together. It was intended that the two statutes should be worked out on the same lines, but they have been linked together in a most inartistic

(1) [1901] 2 Ir. R. 39.

manner. The main question is as to the person or persons in whose name the prosecution should have been instituted—the county council or the local inspector of food and drugs. Undoubtedly, under the Act of 1875, the summons should be in the name of the local inspector or officer as "the person causing the analysis to be made"; and one of the persons mentioned in section 13 is the local inspector.

> "Any medical officer of health, inspector of nuisances, or inspector of weights and measures, or any inspector of a market, or any police constable under the direction and at the cost of the local authority appointing such officer, inspector, or constable, or charged with the execution of this Act."

Any of these persons might procure samples of articles of food and have them submitted to analysis, and the certificate of the analysis is to be returned to "such officer"; and then, by section 20, "the person causing the analysis to be made may take proceedings" for recovery of the proper penalties.

This makes it perfectly plain who should prosecute under the Act of 1875—"the person causing the analysis to be made," viz. the officer of the local authority "charged with the execution of this Act."

But the Act of 1899 (62 & 63 Vict. c. 51), by section 2, provides—

> "2 (1). The Local Government Board may, in relation to any matter appearing to that Board to affect the general interest of any consumer, and the Board of Agriculture may, in relation to any matter appearing to that Board to affect the general interests of agriculture in the United Kingdom, direct an officer of the Board to procure for analysis samples of any article of food, and thereupon the officer shall have all the powers of procuring samples conferred by the Sale of Food and Drugs Acts; and those Acts shall apply as if the officer were an officer authorized to procure samples under the Sale of Food and Drugs Act, 1875."

Then follows a provision as to the mode in which the samples are to be dealt with; and the section proceeds:—

> "(2). The Board shall communicate the result of the analysis of any such sample to the local authority, and thereupon there shall be the like duty and power on the part of the local authority to cause proceedings

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to be taken as if the local authority had caused the analysis to be made."

In the present case everything leading up to and including the procuring a sample for analysis was duly done under this section. The sample was sub-divided, and the portions dealt with as provided, and the result of the analysis was communicated by the Board on the 4th December to the secretary of the county council. The next meeting of that body was on the 9th December, and on this date they passed a resolution that the papers should be sent on to their inspector at Bray to be dealt with by him.

The Justices held that the appellant was not a competent prosecutor, as he had not taken the samples himself, and that the prosecution should have been in the name of the local authority, *i.e.* the county council, and they dismissed the second and third summonses on the ground that for this reason they had no jurisdiction.

In my opinion the true construction to be placed on the provision in question is, that it was the intention of the Legislature to put the local authority in a position to avail themselves of the work done by the Local Government Board or Board of Agriculture, and to allow them to cause proceedings to be taken in the same way as under the Act of 1875. There is considerable difficulty in placing any satisfactory construction on the words of the statute; but it seems to me that the words "*as if* the local authority had caused the analysis to be made" must be taken to mean "as if the local authority (the council) had put their inspector in motion to obtain samples, and cause an analysis to be made"; and the function of the local authority in relation to the certificate of analysis is, as it seems to me, adequately discharged if their secretary, when he receives the certificate, hands that document over to the officer charged with the execution of the Act, to proceed thereon in his own name. The section is awkwardly drafted, and its true construction is far from clear; but the view I take at least prevents the anomaly of having prosecutions under the principal Act taken in the name of the officer specially charged with the duty of putting the Act into force, while prosecutions under the Act of 1899 must be instituted in the name of the

county council, who may not meet before the time-limit fixed by the Act for bringing a prosecution has expired. I am of opinion, therefore, that the case should be remitted to the magistrates, with our opinion that they were wrong in point of law in refusing to entertain these cases.

GIBSON, J. :—

Under the Act of 1875 the duty and responsibility of prosecuting devolved on the officer who caused the analysis to be made. It was he who had to determine whether there should be a prosecution, and his discretion depended on the form and nature of the analyst's certificate, which was not conclusive, and which from its contents might make the success of a prosecution doubtful.

The Act of 1899, 62 & 63 Vict. c. 51, enables the Board's officer to act in procuring a sample and analysis. The result of the analysis is to be communicated to the local authority. The question is whether under section 2 the local authority are placed in the position of the officer who caused the analysis to be made under the Act of 1875. The analysis is to be sent to them and not to their officer, who had nothing to say to the procuring of the sample and analysis. If they are to decide whether there is to be a prosecution or not, it would look as if they (like the Commissioners of Customs under sect. 1, sub-section 3), were to prosecute, and could not delegate to their officer by any general order the decision and discretion to prosecute: *Tinkler's Case* (1). The words "cause proceedings to be taken," which were relied upon by the Solicitor-General, are of common occurrence in statutes (*e.g.* section 123 of Public Health Act, 1878), and do not prove that the proceedings are not to be taken by the local authority in their own name. A grand jury if local authority could not sue under the Act of 1875, but a council as a corporation could prosecute.

If the local authority are to prosecute, can they direct their officer to prosecute in his own name? Suppose they can, the

(1) 2 De G. & J. 261

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prosecution here was commenced apparently without any such special direction by the officer on his own initiative. It is doubtful whether such prosecution can be ratified: *Wilson* v. *Tummon* (1); *Keighley* v. *Durant* (2). If it could be ratified, I doubt if the resolution had that effect, as it does not refer to a pending prosecution, but apparently to future proceedings.

Supposing, however, that the local authority could by a general direction vest in their officer, acting under the statute of 1875, the duty and power of proceeding under the Act of 1899, there is no evidence of any such general direction. I can hardly agree that the duty of the local authority is ministerial. They have a discretion not to prosecute.

The view of my brethren as to the construction of the Act of 1899 is, however, I admit, recommended by convenience. The officer who prosecutes under the Act of 1875 might be expected to act under the Act of 1899; and the time-limit of twenty eight days, imposed by section 19, would embarrass a prosecution by the local authority, who only meet at long intervals. Mr. Wakely pointed out that under the Privy Council Order of 22nd December, 1898, section 36, the council could act by committee, but this does not quite remove the difficulty. The argument from convenience is so strong that I am unwilling to dissent from the conclusion of my brethren who do not share my hesitation.

But as consideration has not removed my doubts, I have thought it right to indicate them without expressing any formal dissent from the decision of the Court.

I agree, as to the summons for refusing to sell, that the applicant was entitled to sue as common informer.

MADDEN, J.:—

I have arrived at the conclusion stated by the Lord Chief Justice, for the following reasons.

In order to understand the amendment of the law effected by the Act of 1899, it is necessary to ascertain the nature and extent of the duties and powers vested in the local authority under the Sale of Food and Drugs Act of 1875. These were of a two-fold

(1) 6 M. & G. 236. (2) [1901] A. C. 240.

character—(*a*) in relation to the analysis of suspected articles of food; (*b*) in relation to proceedings to be taken against offenders, as the result of the analysis.

These duties and powers are performed and executed by the local authority through the instrumentality of an officer appointed under the provisions of the 13th section. The prosecutor in the present case is undoubtedly such an officer duly appointed and charged with the execution of the Act in accordance with this section, and if the analysis had been taken by his procurement, no question could have been raised as to his power to institute proceedings under the 20th section of the Act.

The analysis, however, in this particular case was taken, not by him, but by an officer of the Board of Agriculture, under the provisions of the Sale of Food and Drugs Act, 1899. The authority of this officer is derived under the 2nd section of that Act, which gives him all the powers of procuring samples conferred by the Sale of Food and Drugs Acts, and provides that (with certain exceptions of no importance in the present case) "those Acts shall apply as if the officer were an officer authorized to procure samples under the Sale of Food and Drugs Act, 1875."

It is to be noted that the provisions as to the procuring and analysis of samples in the Act of 1899 are supplementary to those contained in the Act of 1875. The powers and duties of the local authority, and of the officer charged by them with the execution of the Act, remain precisely as they were before the passing of the Act of 1899, except in the particular instance where the sample and analysis have been procured not by their own officer, but by an officer of the Local Government Board or of the Board of Agriculture.

Where the analysis has been procured by the officer of either of these bodies, the second sub-section of section 2 of the Act of 1899 comes into force, which provides that "the Board shall communicate the result of the analysis of any such sample to the local authority, and thereupon there shall be the like duty and power on the part of the local authority to cause proceedings to be taken as if the local authority had caused the analysis to be made."

Now, apart from the argument which I shall deal with presently, founded on the 20th section of the Act of 1875, and

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assuming for the moment the causation referred to in the concluding words of this section to mean causation by the instrumentality of a duly appointed officer, there is no difficulty in harmonizing the provisions of both statutes. The local authority had a duty and power to cause an analysis to be made by its officer under the Act of 1875. Consequent on the exercise of this duty and power through its accredited officer, it had a further duty and power to cause proceedings to be taken through him, in his name and on his initiative. The Act of 1899 empowers another body to perform the duty of causing the analysis to be made; the result is to be communicated to the body originally charged with this duty. Whereupon the further and consequential duties and powers of the last-mentioned body in regard to it are to be the same as if they had caused the analysis to be made, in which case, as I have already pointed out, proceedings for the enforcement of the Act are to be taken by their accredited officer and on his initiative.

But, it is said, the sub-section under consideration enacts that proceedings are to be taken "as if the local authority had caused the analysis to be made," and those words must be interpreted in the light of the Act of 1875, the 20th section of which empowers "the person causing the analysis to be made" to take proceedings against the offender. The local authority, it is contended, is placed by the Act of 1899 in the position of its officer under this section, and, inasmuch as the latter must take proceedings in his own name, so must the local authority.

I cannot adopt this reasoning. The local authority could never be supposed to "cause an analysis to be made" otherwise than through an officer appointed for that purpose. That this is the kind of causation referred to in the sub-section appears, not only from the nature of the case, but from the preceding portion of the section. Causation by the local authority is the alternative to causation by the Local Government Board or Board of Agriculture. But this is not all. It is a settled rule of construction that a word or phrase occurring in any document, including an Act of Parliament, is to be construed throughout in the same sense, in the absence of coercive reason to the contrary. If the power and duty devolving on the local authority upon receipt of

the result of analysis had been to "take proceedings," and not to cause proceedings to be taken, there would be ground for contending that this body was placed in the position occupied by their officer under the Act of 1875, and that proceedings should be taken in the name of the local authority, in the exercise of a discretion exercised by it in each individual case. But when the section speaks of "causing" proceedings to be taken and "causing" an analysis to be made, I see no difficulty in satisfying the rule of construction to which I have referred by interpreting both phrases in a similar manner, and in what appears to me to be their natural sense. That is to say, causation effected through the instrumentality of the officer charged with the administration of the Acts.

It is said that the circumstance that the result of the analysis is to be communicated to the local authority, and not to its officer, suggests the exercise "thereupon" of some discretion on the part of the authority. This again would be a powerful argument if the local authority were thereupon empowered to "take proceedings" instead of cause proceedings to be taken. It appears to me to be a matter which throws no light on the construction of the section as it stands. Whether it be the Local Government Board or the Board of Agriculture who cause the analysis to be taken, the result must of necessity be communicated to the local authority and not to its officer, between whom and the body causing the analysis to be taken there is no privity. This provision in the section is necessary in any view of the case, and it leaves untouched the question of the duty and power which "thereupon" devolved on the local authority.

The nature of this duty and power is to be ascertained from the provisions not only of the Act of 1899, but of the principal statute upon which it has been engrafted. The local authority have, in fact, performed this statutory duty by appointing under the power contained in the Act of 1875 an inspector charged with the execution of that Act, as amended by the Act of 1899, which is to be read as one with the principal statute. They perform the further duty imposed on them by the last-mentioned Act by transmitting to their officer the result of the analysis procured by the officer of the Board of Agriculture. This is a purely

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ministerial act, involving no exercise of discretion on the part of the local body. The resolution subsequently passed by them is, in my opinion, unnecessary to the validity of the proceedings instituted by their officer. In instituting proceedings on the result of the analysis, this officer seems to be placed in the same position, and invested with the same discretion, in regard to proceedings against offenders, as if the analysis had been taken under the principal Act. When all this has been done (as in the present case) the local authority have, in my opinion, caused proceedings to be taken within the meaning of the sub-section under consideration in the same manner as if they had caused the analysis to be taken in the only sense in which that phrase could be applied to the action of a body of this kind, that is to say by their duly appointed officer.

KENNY, J. :—

I also concur in the result.

The "case stated" deals with three summonses. In the first the defendant is charged with wrongfully refusing to sell to one Patrick Duignan, an inspector of food and drugs, an article of food;—in the second with having failed or neglected to attach to parcels of margarine exposed for sale the statutory labels;—and in the third with not having delivered margarine—which he had sold—in a paper wrapper marked as provided by statute. The complainant in the three summonses is the inspector of food and drugs appointed by the local authority; and it appears that Patrick Duignan is an inspector of the Department of Agriculture and Technical Instruction for Ireland. The magistrates in each case considered they had no jurisdiction, the summonses having been signed without the direction of the local authority and in the name of a person who (in the first case) did not seek to purchase the article of food, and (in the two other cases) did not take the samples. In the first case the charge is made under the 17th section of the Sale of Food and Drugs Act, 1875. In the two other cases it is under section 6 of the Margarine Act of 1887 as amended by section 6 of the Sale of Food and Drugs Act, 1899. I shall deal with the latter cases before proceeding

to consider the summons for refusing to sell—inasmuch as different considerations apply to each.

The Sale of Food and Drugs Act, 1875, contemplates two classes of purchasers—(1) members of the general public, and (2) officers of the local authority. When the Act passed the local authority was, in counties, the grand jury, and they had powers under the 10th section to appoint a public analyst. By the 13th section certain officials might, under the direction and at the cost of the local authority appointing such officials, or charged with the execution of the Act, procure samples of food or drugs, and if an official so appointed suspected adulteration he should submit the samples for analysis. Although the Act contains no definition of "local authority," I think it may be assumed that until the Local Government Act of 1898 came into force the local authority "charged with the execution of the Act" in counties was the grand jury, and I further think it could not have been, and was not contemplated by the Act that such a body, ephemeral in its character, and with an existence of but a few days in two periods of the year, should have the duty cast on it of putting in force the penal clauses of the Act, more especially having regard to the limited time within which proceedings have to be taken. A different system was devised. The 20th section dealt with prosecutions by members of the public and officials of the local authority, and provided that in cases where an analysis was necessary as one of the proofs of an offence, the person who caused the analysis to be made might take proceedings for recovery of the penalty *when* the analyst had given his certificate of the result of his analysis. Leaving out of consideration the position of a member of the general public, it seems to me that the local authority under this statute of 1875 can act through its official alone, and that it was possible to act only by the conferring of general and plenary powers on such official, which would enable him to enforce the Act whether the local authority was actually in existence or not. The construction of the 13th and 20th sections supports this view. By the former it is the official who is to procure the sample, and, if *he* suspect adulteration, *he* is bound to submit the sample to analysis. Under the latter it is to *him*, and not to the local

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authority, that the discretion is given as to taking proceedings for recovery of the penalty. Were it otherwise, and that the local authority had to consider each case of alleged adulteration as it occurred, a number of offenders in the intervals between the assizes might possibly escape prosecution. The local authority is charged with the execution of the Act, and it performs the duty so imposed on it by appointing an official in whom is vested the power of taking samples—submitting them for analysis—and taking proceedings for recovery of the penalties. In this sense the grand jury, which was the local authority, "caused" proceedings to be taken up to the passing of the Act of 1898. On that Act coming into operation, the powers and duties of the grand jury in the execution of the Sale of Food and Drugs Act became vested in the county council.

Notwithstanding the amending Act of 1899, the old procedure under the Act of 1875 is still capable of being resorted to, with the substitution of the county council for the grand jury as the local authority; and prosecutions, while "caused" by the county council, would still be carried out under the old machinery. That is, the official who had been appointed with plenary powers retains those powers, and still acts on his discretion as to the issuing of summonses in all cases where he is the person who has caused the analysis to be taken. There is no repeal of the Act of 1875 in this respect; but there is a modification in the shape of a supplementary clause for the sole purpose, as it seems to me, of bringing into action the new Department of Agriculture in regard to the obtaining of samples and submitting them to analysis. The 2nd section enables that department to direct one of its own officers to procure samples, and enacts that "thereupon" that officer shall have all the powers of procuring samples conferred by the Act of 1875, and that that Act shall apply as if the officer were an officer authorized to procure samples under the Act of 1875—that is, he is to take the exact position under the Act of 1875 of the official of the local authority, and have the same identical powers and duties in all the initial steps of the machinery up to the commencement of a prosecution. In every respect up to that stage he is substituted for the official of the local authority; but his powers cease the moment he has submitted the sample to

the analyst. At that stage the Agricultural Department takes up the threads. The analyst having reported, the department communicates the result to the local authority. In the present case it was communicated to the clerk of the county council, which in my opinion complies with the Act. On receipt of the report the local authority is to take the next step; and for that purpose it is to have the same powers and be under the same obligations as if its own official had obtained the samples and had caused the analysis to be made. That seems to me to be the clear meaning of subsection 2 of section 2. The local authority is to have the like power of "causing proceedings to be taken as it had under the Act of 1875." What is that power? Is it not the existing power of putting in motion its own official, who is already armed with plenary authority in the same way as he would have been put in motion under the Act of 1875? Under that Act he moves at his own discretion. When his masters—and he through them—get the report, it would seem to me that he is still the person to exercise the discretion. I would not infer, and I could not assume as against the complainant, that the two summonses were issued in his name otherwise than by his authority and on his information. If that be so, the certificate of the analyst, being in the possession of the county council, must in the view I take be deemed to be in his possession; and, consequently, he was in a position to take the proceedings which he did without waiting for any resolution, direction, or minute of the county council. It follows from the view I take that, so long at least as the county council place no restriction, either generally or in particular cases, on the plenary powers of their official, it is his duty to exercise his discretion as to proceedings without waiting for any directions from the county council. I therefore think that no antecedent authorization in the particular case by the county council was necessary, and that the complainant was the proper person to take proceedings.

With reference to the first summons for refusing to sell to Duignan, the cases of *Kenealy* v. *O'Keeffe* (1) and *Lawler* v. *Egan* (2) are direct authorities that any member of the public can institute a prosecution such as that in the present case.

(1) [1901] 2 Ir. R. 39. (2) *Ibid.* 589.

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CONNOR v. BUTLER.

The Court made the following order :—

"THE COURT, having heard and determined the questions of law arising on the case, and being of opinion that the complainant was entitled to maintain the prosecution in said three complaints, it is considered and adjudged by the King's Bench Division now here that the Justices were not correct in point of law in their said determination: And it is ordered that the case be remitted to the said Justices, in order that they may proceed to hear and determine the said complaints according to law. No costs."

Solicitor for the appellant: *R. G. Warren.*
Solicitors for the defendant: *Hamilton & Craig.*

A. E. R. J.

WALLIS *v.* RUSSELL (1).

K. B. Div. 1901. June 20, 21, 29. *Appeal.* Nov. 14, 15. 1902. Feb. 25.

Sale of goods—Contract—Warranty—Food—Sale for a particular purpose—Reliance on seller's skill or judgment—Reasonably fit for use—Latent defect—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *sect.* 14, *sub-sect.* 1 *—Construction of Codifying Statute.*

The plaintiff sent her granddaughter, Miss D., to the shop of the defendant, a fishmonger, for two crabs. Miss D. told G., the defendant's manager, that the plaintiff wanted two nice fresh crabs for her tea. G. stated that he had no live crabs, but that he could give her boiled ones. G. went to the window and took up two crabs. Miss D. pointed to another crab, and asked if he did not think it better. G. took it up and felt it, and said it was by the weight one should judge and not by the size, and put it away. Miss D. asked were they nice and fresh, and G. replied that they were. Miss D. paid for the crabs, and took them away. The defendant *bona fide* believed the crabs to be fresh and fit for human food. The plaintiff and Miss D. ate portions of the crabs that evening, and they both became seriously ill. In an action for damages on an express warranty, and also on a warranty to be implied under the Sale of Goods Act, 1893, the jury found that it was made known to the defendant that the crabs were required for use as human food; that the plaintiff relied on the defendant's assistant to select fresh crabs, and reasonably fit for that purpose; that the crabs were goods which it was in the course of the defendant's business to supply; and that those supplied were not fresh and reasonably fit for human food. They also found that the defendant did not expressly warrant the crabs, and found a verdict for the plaintiff for £150:—

Held, by the King's Bench Division, that the warranty implied by sub-sect. 1 of sect. 14 of the Sale of Goods Act, 1893, on a sale of goods is not confined to manufactured goods; that the purpose indicated for which the goods in the present case were required, viz. for consumption as human food, was a "particular purpose" within the meaning of the sub-section; and that the verdict in favour of the plaintiff should stand.

The principle of construction of codifying statutes considered by Palles, C.B.

Held, by the Court of Appeal (affirming the decision of the King's Bench Division), that the crabs were bought for a particular purpose, made known to the seller, within sect. 14, sub-sect. 1, of the Sale of Goods Act, 1893, so as to show that the buyer relied on the seller's skill and judgment, and that the defendant was liable for damages.

(1) In the King's Bench Division, before PALLES, C.B., and ANDREWS, J.

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Held, by Fitz Gibbon, L. J., that the seller would have been equally liable on the evidence at common law, and under section 14, sub-section 2, of the Act.

ACTION for damages for breach of warranty in the sale by the defendant to the plaintiff of two crabs. On the evening of the 24th July, about 5.30 o'clock, the plaintiff, a lady residing in Cork, sent her granddaughter, Miss Donovan, to the shop of the defendant, a fishmonger in Cork, for two crabs. Gemmell, an assistant of the defendant, who served her, said that he had no live crabs, but that he could give her boiled ones. She agreed to take them, and stated that the plaintiff sent her down for two nice fresh crabs, which she wanted for her tea. Gemmell went to the window and took up two crabs; she pointed to another and said, "Don't you think that is a better crab?" Gemmell took it up, felt it, and said it was by the weight one should judge and not by the size; he put it away. Miss Donovan asked him, "Were they nice and fresh," and he said, "Yes." She then paid the price, 6*d.*, and went home. Miss Donovan, in her evidence at the trial, stated that she relied altogether on Gemmell's judgment.

The plaintiff, her granddaughter, and the servant ate portions of the crabs without noticing anything wrong. That evening the plaintiff suffered from spasms and cramps, and that night, and for several days, she was dangerously ill. She was confined to her room for five weeks, and the medical evidence showed that she suffered from poisoning. Miss Donovan was also seriously ill for some weeks; during some portion of the time her life was in danger.

The defendant, Thomas Russell, a fishmonger in Cork, deposed that a man named Beamish supplied him with crabs from Tragumna Bay, in the county of Cork. On Monday, the 23rd July, he received a consignment of five dozen and four crabs from Beamish; the goods generally arrived between three and four o'clock in the afternoon. His custom was to boil some and sell others alive. The crabs were boiled in the shop, and the practice was, immediately before boiling, to kill the crab by piercing it with a needle, and then it was boiled for twenty or thirty minutes. He had received no complaints from anyone

except the plaintiff, though he had traced the sale of twenty-six of the crabs, and had got the names of the persons to whom he had sold them. He had got the crabs fresh, and honestly believed they were fit for food.

Beamish stated that the crabs were all caught on the previous day, or on Saturday. They were kept in a floating cradle in the sea until they were despatched, and they were all alive on Monday morning, when he sent them to Cork. Tragumna Bay was a large bay with a sandy bottom, varying in depth from four to eight fathoms in the inner portion to fourteen fathoms in the outside; there was no stream or sewage running into the bay.

Gemmell, the defendant's manager, stated that three dozen of the consignment of crabs were killed and boiled, and the rest were sold alive. When Miss Donovan came to the shop on Tuesday evening all the live crabs had been sold. If there was anything wrong with the crabs he would have detected it by the weight and feel of them, and the two he sold to her were, so far as he could see, fit and proper.

Several witnesses were examined, without objection, to prove that they bought and ate some of the same consignment of crabs without suffering any bad effect.

Bushe, K.C., for the defendant, asked for a direction on the ground that there was no implied warranty.

LORD O'BRIEN, L.C.J., left the following questions to the jury:—

1. Was it made known to the defendant's assistant that the crabs were required for use as human food? Answer—Yes.

2. Did the plaintiff through Miss Donovan rely on the defendant's assistant to select fresh and reasonably fit crabs for that purpose? Answer—Yes.

3. Were crabs goods which it is in the course of defendant's business to supply? Answer—Yes.

4. Were the crabs supplied fresh and reasonably fit for use? Answer—No.

5. Did the plaintiff by eating said crabs suffer the illness and injuries complained of? Answer—Yes.

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6. Did the defendant expressly warrant the crabs were fresh and good? Answer—No.

7. Had the plaintiff through her agent a reasonable opportunity of examining the crabs at time of sale? Answer—Yes.

8. Did the defendant honestly believe the crabs were fresh and fit for food? Answer—Yes.

The jury found for the plaintiff with £150 damages, and his Lordship gave judgment for the plaintiff.

The defendant moved in the King's Bench to set aside the judgment and verdict, and that judgment should be entered for him.

The Right Hon. The Macdermot, K.C., and *Campbell, K.C.* (with them *D. M'C. Mahony*), for the defendant:—

The plaintiff relies on sub-section 1 of section 14 of the Sale of Goods Act, 1893; that sub-section applies only where the purpose made known to the seller is a *particular* purpose, that is to say where an article is capable of being applied to several purposes and the buyer states that he wants it for one of these purposes. The purpose in the present case, viz. for use as human food, is a general as distinct from a particular purpose. The sub section does not apply to the sale of a specific article: in such case the rule is *caveat emptor*. A specific article is to be distinguished from a specified article. The sub-section applies only to manufactured goods, otherwise the words "whether he be the manufacturer or not" are meaningless. The Legislature could never have intended that on every sale of an article intended for the food of man or beast there should be an implied warranty by the seller that it was free from any defect known or unknown to him.

Ronan, K.C., and *Brereton Barry, K.C.* (with them *Matthew J. Bourke, K.C.*, and *R. M. Hennessy*), for the plaintiff:—

The Sale of Goods Act is a codifying statute; it must therefore be construed according to its natural meaning, uninfluenced by any considerations to be derived from the previous state of the law. The present case comes exactly within the words of section 14, sub-section 1. Use for human food is a particular purpose.

The definitions of "goods" in section 62 and of "contract of sale" in section 1 show that the implied warranty cannot be confined to manufactured goods.

[The following authorities were referred to:—*Emmerton* v. *Mathews* (1); *Smith* v. *Baker* (2); *Randall* v. *Newson* (3); *Jones* v. *Just* (4); *Bigge* v. *Parkinson* (5); *Wilson* v. *Dunville* (6); *Burrows* v. *Smith* (7); *Ward* v. *Hobbs* (8); *Bank of England* v. *Vagliano Brothers* (9); *Gillespie* v. *Cheney* (10); *Chanter* v. *Hopkins* (11); *Burnby* v. *Bollett* (12); *Beer* v. *Walker* (13); Benjamin on Sales, 4th Ed. pp. 658, 659, 672.]

Cur. adv. vult.

June 29.

PALLES, C.B.:—

The question for decision in this case is stated to be a novel one; and certainly it is one of great interest and importance. In deciding it I wish to put some matters out of consideration, in order to reduce the question to that which I conceive is the net one. I accordingly assume that the purchase was made, not by the young lady who was sent by the plaintiff, but by the plaintiff herself personally, and that the conduct of the shop assistant was that of the defendant himself; and therefore I treat the matter as one of a purchase by the plaintiff in person from the defendant in person.

I agree with the defendant's counsel, that the questions left to the jury were not critically accurate; because the words in the section in question are, "so as to show that the buyer relies on the seller's skill or judgment" (14); and the first question, as framed, does not exactly raise that question. No objection, however, was taken at the trial to the form of the question; and, having regard to the finding of the jury upon the first

(1) 7 H. & N. 586.
(2) 40 L. T. (N. S.) 261.
(3) 2 Q. B. D. 102.
(4) L. R. 3 Q. B. 197.
(5) 7 H. & N. 955.
(6) 4 L. R. Ir. 249.
(7) 10 *Times* L. R. 246.
(8) 4 App. Cas. 13.
(9) [1891] A. C. 144.
(10) 12 *Times* L. R. 274.
(11) 4 M. & W. 399.
(12) 16 M. & W. 644.
(13) 46 L. J., C. P. 677.
(14) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, s. 14).

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question, I cannot entertain any doubt that if the question put to the jury had been, "Was it mentioned by Miss Donovan to the defendant that the crabs were required for use as human food, *so* as to show that she relied upon his skill and judgment?"—that is, "so that the purchaser showed to the vendor that she relied on his skill and judgment"—it could have been answered in but one way—in the affirmative. I intend therefore—the form of the question not having been objected to—myself to draw the inference that the purpose for which the goods were purchased was made known to the defendant, *so* as to show that the buyer relied on the seller's skill and judgment.

So far for matters that are purely formal.

This brings me to the Act of Parliament. Before referring to its words it is right to refer to the principle of construction for which Mr. Ronan contends, and which, he insists, was laid down by the House of Lords in *The Bank of England* v. *Vagliano* (1). That principle, he says, is, in the first instance, to examine the words used, and to ask what is their natural meaning, uninfluenced by any considerations derived from the previous state of the law; and that recourse to that previous state of the law cannot be had without some special ground.

Some reason for the argument that this was the view of Lord Herschell may possibly be found in the opinion he delivered in that case (2), although I rather think that the essence of objection to the course of reasoning of the Court of Appeal, to which he referred, was conveyed by these words—"and then, *assuming* that it was probably intended to leave" the law "unaltered, to see if the words of the section will bear an interpretation in conformity with this view." But however this may be, what is relied on is the language of one only of eight learned lords who constituted the Court. It in no sense binds us; and to prevent infringement upon the true principles of interpretation, I desire to put upon record my protest against a principle of construction which, in relation to even a codifying statute, excludes from consideration the previous state of the law upon the matter which is the subject of the legislation.

(1) [1891] A. C. 107. (2) *Ib.* pp. 144, 145.

It is, as I understand the law, presumed that the Legislature, in making any enactment, knows the previous state of law upon the subject-matter, and legislates upon the basis of, and with reference to, it. If so, the meaning of the words it uses cannot be understood in the absence of that which was their basis.

I now approach more critically the statute in question; and in order to avoid raising in this particular case questions which do not, or at least, in my opinion, ought not to, arise, I shall adopt Lord Herschell's mode of construction, and first consider the particular words used, without reference to the previous law, and then see whether, consistently with his view, I can refer to the previous law. In so doing, the principle which I shall apply is not, in my opinion, strictly speaking, the correct one; but at the same time the result arrived at will be exactly the same as if I adopted my own view.

The questions argued, and which we have to determine upon the section, are two: (1) whether its subject-matter is confined to manufactured goods; (2) whether the purpose indicated in this particular case, *i. e.* that the article was intended for human food, is a "*particular* purpose" within the meaning of the section.

As to the first question. The 13th section commences by a reference to goods generally, without any restriction to any particular class of goods, whether manufactured or not. "Where there is a contract for the sale of *goods* by description," and in the same sentence goods are referred to three times, and in each instance the word is preceded by the definite article "the," meaning the goods previously mentioned—goods, without restriction. Passing, then, to the 14th section, we have, in the portion of it which precedes the division into sub-sections, the word "goods" occurring in a context in which it clearly means "any goods"; and in the 1st sub-section itself the word occurs three times. In the place of its first use, "where the buyer expressly or by implication makes known to the seller the particular purpose for which *the goods* are required," the expression is apparently used in as general a sense as the same word was in the previous part of the section. In the second place in which the words are used, "and the goods"—that is "the goods" previously mentioned—"are

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of a description which it is in the course of the seller's business to supply," these words, no doubt, contain a limitation of the class of goods; but the limitation is *not* to manufactured goods. Then the third expression in which "the goods" are used is, "there is an implied condition that the *goods* shall be reasonably fit for such purpose." Pausing there for a moment, it seems to me clear, as a matter of grammatical construction, that goods, to be within the sub-section, are subject to one, and but one, limitation —they must be "goods of a description which it is in the course of the seller's business to supply."

Passing then from the subject-matter of the section—goods—to a wholly different thing, the vendor of the goods: he must be a person in the course of whose business it is to supply goods of that description, "whether he be the manufacturer or not."

The object with which those words are introduced into the sub-section is not to limit, but to prevent a suggested limitation of, the class of persons who otherwise would be within the section. That class is defined to be a vendor whose course of business it is to supply goods of the particular description. Whether the vendor be or be not the manufacturer has no connexion with that character. The words cannot be used as words of restriction.

Then, their plain purpose is not to introduce, but to exclude, an element from consideration. It is a warning to those who are to construe the statute, that in considering the persons who are within the enactment, who have been accurately and scientifically defined as persons in the course of whose business it is to supply a particular description of goods, it is to be deemed immaterial whether the person be the manufacturer or not.

In my opinion it is clear, upon the grammatical construction of the words, that they are used to prevent any restriction of the ordinary meaning of the words used to describe the dealer, and to show that the liability is to attach to that person merely in his character of dealer, and that in ascertaining the character of dealer you should exclude from consideration the fact whether he was the manufacturer or not—in other words, it was to make it, if possible, clearer than before that the liability was one *qua* dealer and not *qua* manufacturer.

Therefore, were I to construe the sub-section without reference

to the existing law upon the subject, I should be of opinion that the plaintiff's contention upon the first question was right, and that we are not at liberty to restrict the enactment to manufactured goods. At the same time, as, upon the words of the statute, I am not able to ascertain the reason for the introduction of the words "whether he be the manufacturer or not," I should find myself coerced, even if I adopted Lord Herschell's doctrine, to examine the existing state of the law, to ascertain as well as I could what the Legislature had in mind in inserting those words.

What, then, was the existing law on the subject immediately prior to the Act of 1893? As to this, a vast number of cases have been cited. I do not intend to wander through them all; it will be sufficient if I ascertain from them generally the law in reference to this particular subject-matter.

In the first place, the law made a distinction which I am of opinion it was one of the objects of the statute to alter. It made a distinction between implied warranties (such as those within sub-section 1) and implied conditions (such as those within sub-section 2) in the case of a buyer who had had, but had not availed himself of, an opportunity of examining the goods the subject of the contract. The case in which the law is most conveniently summarised, and one of those which the language used shows what the Legislature had before it in the framing of this section, is *Jones* v. *Just* (1). I do not think that case decided anything new; I refer to it merely as containing a convenient summary of the law upon the subject. "First: where goods are *in esse*, and *may be* inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor the manufacturer. The buyer in such a case has *an opportunity of* exercising his judgment upon the matter, and if the result of his inspection be unsatisfactory, or if he distrusts his own judgment, he may if he chooses require a warranty. In such a case it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable. So in

(1) L. R. 3 Q. B. 197; 9 B. & S. 141.

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the case of the sale in a market of meat which the buyer had inspected."

That is, the warranty in sub-section 1, and the condition in sub-section 2, were under those circumstances excluded by the former law. I pass over the second and third classes referred to in the case, and come to the fourth. "Fourth: where a *manufacturer or a dealer* contracts to supply an article which he manufactures or *produces*, or in which he *deals*, to be applied to a particular purpose, *so* that the buyer *necessarily* trusts to the judgment or skill of the manufacturer or dealer. There is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied."

That class plainly includes only cases in which there has been neither inspection nor opportunity for inspection; *so* that the buyer *necessarily* trusts to the judgment or skill of the vendor.

These two passages clearly mark the distinction in the old law. Even if there were not an examination in fact, if there was an opportunity for examination, there was no warranty, because the buyer might, if he liked, have examined, and that was held to rebut any implication that he was relying on or trusting to the judgment of the vendor. He did not *necessarily* trust to it. But when there was no opportunity for inspection, *so* that *necessarily* he should trust to the judgment of the vendor, then there was that which could not in strictness be called a warranty; there was a condition that the goods should be reasonably fit for the purpose to which it was specified they were to be applied.

So much as to the element of inspection. Now as to the matter which is in controversy here. It is an entire mistake to say that the implication of warranty under the old law was confined to the case of manufactured goods. In *Bigge* v. *Parkinson* (1), in which the question was as to the quality of provisions, Cockburn, C.J., says: "There are two questions; first, whether upon a contract to supply provisions there is an implied warranty that they shall be reasonably fit for the purpose for which they are intended. Upon that point not a doubt can be entertained. The principle of law is correctly stated in the passage cited from Chitty on Contracts.

(1) 7 H. & N. 955.

Where a buyer buys a specific article, the maxim *caveat emptor* applies; but where the buyer orders goods to be supplied, and trusts to the judgment of the seller to select goods which shall be applicable to the purpose for which they are ordered, there is an implied warranty that they shall be reasonably fit for that purpose; and I see no reason why the same warranty should not be comprehended in a contract for the sale of provisions."

The law there is taken for granted; and were it necessary to inquire into earlier cases it would be found that, both expressly and by way of illustration, sales of goods which were not manufactured are frequently referred to as raising this implied condition. For instance, in *Chanter* v. *Hopkins* (1), where there was a question as to the sale of an article by a well-known trade name, by a name described as "a patent name," Lord Wensleydale, no mean authority upon the subject, refers to this condition as a matter of illustration, and therefore as a matter perfectly clear: "Suppose a party offered to sell me a horse of such a description as to suit my carriage, he could not fix on me the liability to pay for it unless it were a horse fit for the purpose it was wanted for. But if I describe it as a particular bay horse, the contract is performed by his sending that horse" (2).

Burnly v. *Bollett* (3) is relied upon by the defendant. That was a case of a sale of a carcase of a pig; but it was decided, not upon the ground that there was no implied condition in a case where the vendor was a dealer in goods of that description, but because the vendor was not a dealer; and in *Emmerton* v. *Mathews* (4), also relied upon by the defendant, where it was held that there was no implied warranty upon the sale of a carcase of meat, the sale was of a specific carcase, which the purchaser had had an opportunity of inspecting. In *Burrows* v. *Smith* (5) the matter was treated by Mr. Justice Mathew as clear.

Some passages have been referred to from a book of great authority — the late Mr. Benjamin's work on Sales—but the meaning of those passages has been misunderstood. What is laid down there is that there was no implied warranty upon a sale of

(1) 4 M. & W. 399.
(2) *Ibid.* 406.
(3) 16 M. & W. 644.
(4) 7 H. & N. 586.
(5) 10 *Times* L. R. 246.

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provisions for the inspection of which there was an opportunity at the time of the sale. It was not that provisions were to be excluded from the general class of goods upon the sale of which there is an implied condition of fitness for specified purpose; but that, where there was an opportunity of inspection, there was not in the sale of provisions an implied term which did not exist in the sale of other goods, a warranty of fitness grounded on the existence of certain statutes which made it punishable to sell provisions which were not wholesome, even where there was an opportunity of inspection.

Now, having stated my view of the prior law upon the subject, I come back to the statute; and I commence by referring to a sub-section (No. 2) not in question here, but from which I think I can derive a good deal of assistance in construing the sub-section in controversy. Sub-section 2 relates to sales of goods by description; and it contains this proviso in reference to examination: "if the buyer *has examined* the goods there shall be no implied condition as regards defects which such examination ought to have revealed."

Thus, in express terms, there is an alteration in the law. Had it been intended merely to reproduce the law as it existed, the words would have been—"if the buyer has had an *opportunity of examining* the goods." Here is evidence of a deliberate intention of the Legislature, that, as regards the sales dealt with in this sub-section, which is *in pari materia* with sub-section 1, there shall be two changes in the law—(1) that the exclusion of the implied condition shall rest, not as theretofore upon an opportunity of examination, but upon examination in fact; and (2) that, even if there is an examination, a warranty shall be implied, except as to defects which such examination ought to have revealed.

Now in sub-section 1 there is no proviso similar to that in sub-section 2; therefore, whatever may be the extent of application of sub-section 1, whether it is or is not limited to manufactured goods, it is plain that the former law excluding the warranty mentioned in sub-section 1, in cases where there was an opportunity of examination, has been altered as to cases within that sub-section. Therefore I have it that, by each of these two

sub-sections, the Legislature has altered the law in reference to the effect of an opportunity of examination, upon the implication of a warranty or condition of fitness. The existence of an opportunity, and even the fact of an examination, is declared to be insufficient to exclude the warranty mentioned in sub-section 1, if the circumstances are such as to show the vendor that his judgment or skill was relied upon by the purchaser. In fact, the view of the Legislature appears to have been that instead of the law, as theretofore, presuming that the buyer relied upon his own judgment where there was an opportunity of inspection, for the future, whether he relied upon his own judgment or not should be a question of fact. In cases within sub-section 2, if he has examined the goods, he is to be held to have relied upon his own judgment, so far, but so far only, as regards defects observable upon examination. But in cases within sub-section 1, in cases in which the vendor is aware that his judgment and skill is relied on by the buyer, opportunity of examination, or the fact of examination, is thenceforth to be immaterial.

Now, having ascertained that there has been that change made in the law, let me take the law in which that change was made. The warranty implied by sub-section 1, according to the then existing state of the law, applied to the sale of *all* articles, provided that the purpose for which they were bought was made known to the vendor, that his judgment was relied upon, that there was no opportunity of examination, and that the vendor was a person the course of whose business it was to deal in that description of goods; and in such cases it was so implied, whether the vendor was a manufacturer or not, and whether the goods were or were not manufactured. Now, exclude the elements of opportunity of examination, and of the fact of examination, which I have shown the Legislature considered to be insufficient to exclude the warranty or condition, and what have you? You have then an intention that the warranty formerly implied shall be so altered as to be identical with the warranty mentioned in this sub-section, if such sub-section be literally and grammatically construed.

As to the words "whether he be the manufacturer or not," if the books are examined it will be found that they are nothing more than the result of legal evolution. At first this warranty

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was implied in cases of sales by manufacturers; later on it came to be implied in sales by dealers. If the cases are examined, commencing, I think, with *Brown* v. *Edgington* (1), it will be found that in all the earlier cases, including *Jones* v. *Just* (2), the character first mentioned is always "a manufacturer"; and although the cases extended the warranty to sales by dealers, the Judges appear not to have described the class *simpliciter* as "dealers," but they used the word with the addition "whether he be the manufacturer or not"; and thus the words "whether manufacturer or not" crept into the clause in the process of the progression or evolution of the principle. In my opinion, the words mean nothing more—indeed, mean nothing whatsoever; and I should have arrived at the same conclusion upon the reading of the section by itself, for the moment you find the expression "and the goods are of a description which it is in the course of the seller's business to supply" you put out of consideration his character as manufacturer. The liability, if it attaches to him at all, is to attach to him in a character different from that of manufacturer. I have no doubt that the way those words came to be inserted was because, in framing the section the draftsman had before him the case of *Jones* v. *Just* (2), in which will be found the words "manufacturer or dealer."

So much for the first ground of limitation relied upon. I come now to the second—on the meaning of "particular purpose." As to that I have but little to say. The well-known judgment of Best, C.J., in *Jones* v. *Bright* (3), points out the distinction between two classes of warranty, or, strictly speaking, of warranty and condition, that are dealt with in the two sub-sections under consideration: 1, fitness for a particular purpose; 2, that the goods shall be of a merchantable quality. Where no purpose is mentioned, there is a warranty, or condition, as the case may be, that the goods are, in the words of Best, C.J., "fit for *some* purpose," or, in other words, merchantable as such; where a *particular* purpose is mentioned, the warranty or condition is that they shall be reasonably fit for *that* purpose. I think that that distinction, which has been established by the course of legal decision for a century, shows that the words "particular purpose" in a case

(1) 2 M. & G. 279. (2) L. R. 3 Q. B. 268. (3) 5 Bing. 533.

of this description have a technical meaning; that it is not so much particular purpose as distinct from general purpose; but it is purpose stated to the seller, as distinct from absence of purpose stated to the seller. In the absence of purpose stated, the warranty is that the article shall be fit for some purpose—in other words, merchantable; where the purpose is stated, the warranty is that it shall be fit for *that* purpose. I cannot doubt that the purpose of using for human food is a "particular purpose" within the meaning of the sub-section.

For these reasons, I am of opinion that the second attempt to limit the purview of the sub-section fails; and, drawing the inference of fact I mentioned in the commencement of my judgment, I am of opinion that we ought to uphold the verdict, and that the motion should be refused with costs.

ANDREWS, J.:—

After a careful consideration of the statute and the authorities, I agree with the judgment which has been delivered by my Lord Chief Baron.

J. G. T.

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The defendant appealed (1).

Campbell, S.-G., The Right Hon. The Macdermot, K.C., and *D. M'Carthy Mahony*, for the appellant:—

Unless the law has been changed by sect. 14 of the Sale of Goods Act, 1893, the appellant is entitled to judgment; fraud and negligence are both out of the case. The best summary of the law before the Sale of Goods Act, 1893, is to be found in *Jones* v. *Just* (2), in which Mellor, J., classifies the whole of the cases under five different heads. We submit that this case comes under the first of the five heads there stated, viz. where the goods are *in esse*, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists is latent, and not discoverable upon

(1) In the Court of Appeal before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

(2) L. R. 3 Q. B. 197.

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examination, at least where the seller is neither the grower nor manufacturer. A salesman who sold in the public market meat which was afterwards found to be unfit for human food, but which he had no means of knowing to be so, was held not to be liable in an action of implied warranty: *Emmerton* v. *Mathews* (1). It was always so in the case of the sale of a specific article. *Parkinson* v. *Lee* (2) was the case of the sale of hops by sample, and the vendor was held not answerable for a latent defect. To the same effect is *Chanter* v. *Hopkins* (3), the case of the sale of a smoke-consuming furnace which was found to be of no use in a brewery. In *Smith* v. *Baker* (4) there was a sale in public market of meat which had no discoverable defect by an ordinary inspection, but which was afterwards found to be unfit for human food, to a purchaser who selected it himself, and it was held there was no implied warranty that the meat was good. *Burnby* v. *Bollett* (5) was the case of the purchase of a dead pig in a public market from a butcher which turned out unsound, and it was held there was no warranty. *Drummond* v. *Van Ingen* (6) is a good illustration of the sale of a particular article, but that was the case of a sale by sample. In the present case the purchaser had an opportunity of inspecting the goods, and exercised her own judgment in the selection. There is no warranty in the case of the sale of goods across a counter, except that the article sold must be a reasonable representation of what is asked for. We deny that there was a "particular purpose" in this case, when the only purpose for which the crabs could be bought was for eating.

We submit that sect. 14, sub-sect. 1, has not altered the law as laid down in these cases. This sub-section contemplates goods bought and sold on description, that is goods to be manufactured to the order of the purchaser, or goods not *in esse* when the purchaser describes what he wants and the purpose for which he wants them, or goods which, though *in esse*, are not available for inspection at the time. The "particular purpose" in sub-section 1 must be something different from the only purpose to which the goods could, from their general character, be applied. General purpose

(1) 7 H. & N. 586.
(2) 2 East, 314.
(3) 4 M. & W. 399.
(4) 40 L. T. (N. S.) 261.
(5) 16 M. & W. 644.
(6) 12 A. C. 284.

of food is not a particular purpose within the meaning of this sub-section.

Matthew J. Bourke, K.C., and *Brereton Barry, K.C.* (with them *Ronan, K.C.*, and *R. M. Hennessy*), for the respondent:—

We submit that the case comes within sub-sect. 1 of sect. 14 of the Sale of Goods Act. There are two questions—(*a*) Did the purchaser buy on her own judgment, or did she rely on the skill and judgment of the vendor? (*b*) The purchase of an article for a particular purpose has a definite meaning, in contrast to purchase of an article generally, or of goods by description.

Buying goods for a particular purpose means that the purchaser states to the vendor what he wants the goods for. When a vendor sells a commodity for a particular purpose he must be understood to warrant it reasonably fit for the purpose. In *Jones* v. *Bright* (1), where a purchaser bought copper sheathing for the bottom of a vessel, there was an implied warranty. So in *Brown* v. *Edgington* (2), on a purchase of ropes by a wine merchant, who stated he required them for hoisting casks out of a cellar. *Bigge* v. *Parkinson* (3) decided that the implied warranty that goods should be reasonably fit for the purpose for which they were supplied applies to the sale of provisions. In *Beer* v. *Walker* (4) the implied warranty was held to apply to a contract for a supply of rabbits by a provision dealer to a retail trader. So in *Burrows* v. *Smith* (5) an implied warranty was held to exist in the case of a sale of partridges, when the birds arrived in a putrid condition. Whether an article is not fit for the particular purpose is a question of fact: *Mody* v. *Gregson* (6); *Chanter* v. *Hopkins* (7); and the jury have found that the crabs were not fresh and reasonably fit for use. On the first four findings of the jury we are entitled to sustain the verdict. In *Emmerton* v. *Mathews* (8); *Smith* v. *Baker* (9); *Burnby* v. *Bollett* (10), the purchaser relied on his own judgment.

Where the buyer trusts to the skill and judgment of the vendor

(1) 5 Bing. 533.
(2) 2 M. & G. 279.
(3) 7 H. & N. 955.
(4) 46 L. J. (N. S.) C. P. 677.
(5) 10 *Times* Rep. 246.
(6) L. R. 4 Ex. 49.
(7) 4 M. & W. 399.
(8) 7 H. & N. 586.
(9) 40 L. T. (N. S.) 261.
(10) 16 M. & W. 644.

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means that he was buying a specific article—in this case two "nice fresh crabs for tea." By asking for nice fresh crabs for tea, and by her acts, the purchaser showed that she relied on the seller to select them, and the jury have so found.

We also submit that we are entitled to judgment under subsect. 2 of sect. 14. The goods were bought by the description of "nice fresh crabs for tea"; the buyer did not examine them; but if she had she could not have discovered the defect.

1902. Feb. 25.

LORD ASHBOURNE, C.:—

This case raises an important question on the Sale of Goods Act, 1893, and as similar questions may constantly arise in the ordinary transactions of everyday life, we have taken some time to consider the arguments and form our conclusion.

The facts are few, simple, and undisputed. Although the plaintiff on the occasion in question was represented by her granddaughter, and the defendant by his manager, I shall for convenience refer to them as plaintiff and defendant, leaving the granddaughter and manager unmentioned. The plaintiff went to the defendant's shop, where fish and crabs were daily exposed for sale, and asked the defendant for "two nice fresh crabs which she wanted for her tea." The defendant said, "That they had no live crabs in stock, but that he had boiled crabs." He took up two crabs, and was asked by the plaintiff "were they nice and fresh," and he said they were. The plaintiff pointed out another which she thought looked better, but defendant put it aside, because "he knew by the weight and feel of the crabs" that he had selected better ones. He said that if there was anything wrong with the crabs he would have detected it by the weight and feel of them, and that the crabs he selected were, as far as he saw, fit and proper. Sixpence was paid for the two crabs, they were taken home, nothing was noticed wrong until they were eaten, and then it was found that they were poisonous and caused the damage ascertained by the jury.

It cannot be suggested that either party was to blame, and the question is the difficult one that occasionally arises—which of two innocent persons is to bear a loss? The question is important, for the buyer might lose her life and the seller might

lose his fortune, and all in a trivial transaction, involving as here goods that only cost sixpence.

The plaintiff could see and inspect the crabs, but she relied on the defendant to select crabs which should be nice and fresh and fit for tea. The defendant did select them, knowing that the plaintiff wanted them for speedy consumption to be "nice and fresh and fit for tea." The jury have found that the plaintiff relied on the defendant to select fresh and fit crabs for the purpose; that the plaintiff had a reasonable opportunity of examining the crabs; and that the defendant did not expressly warrant that the crabs were fresh and good.

The question we have to decide turns on the construction to be given to certain words in the Sale of Goods Act, 1893, which is an Act for codifying the law relating to the sale of goods. I entirely concur with what the Lord Chief Baron has said as to the frequent utility of keeping clearly in view the state of the law established by cases when the Legislature applied itself to embody it in a code.

The most pertinent clause of the Act for our purpose is section 14 (1). [The Lord Chancellor read the section.]

The question that arises on this provision is, was the purpose for which the crabs were stated to be required, "nice fresh crabs for tea," a particular purpose within its meaning? The Lord Chief Baron was broadly of opinion that the purpose on being stated became a particular purpose, and therefore within the clause. This term "particular purpose" is familiar to the law codified in 1893. It is found in the judgment of Mellor, J., in *Jones* v. *Just* (1), on which clause 14 (1) is founded. It is frequently found in other cases, and notably it will be found in the Mercantile Law Amendment Act (Scotland), 1856. Although the Act is confined to Scotland, the preamble strongly conveys that what it enacts for Scotland was then the law of England. Its 5th section enacts as follows:—"Where goods shall after the passing of this Act be sold, the seller, if at the time of the sale he was without knowledge that the same were defective, or of bad quality, shall not be held to have warranted their quality or

(1) L. R. 3 Q. B. 197.

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sufficiency, but the goods with all faults shall be at the risk of the purchaser, unless the seller shall have given an express warranty of the quality or sufficiency of such goods, or unless the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered, without such warranty, to warrant that the same are fit for such purpose."

It will be at once noted that that which the English section mentions a "particular purpose," the Scotch section names a "specified and particular purpose." I think that the Legislature in saying in 1893 "particular" considered that it included "specified," and that whatever was said or disclosed at the time of the buying was specified, and so became particular.

Sales by description and sales by sample, dealt with by other provisions in the Act of 1893, raise other considerations, the seller remaining liable for defects not apparent on examination. The defendant has struggled hard to bring himself within the protection of the maxim *caveat emptor*, but that is entirely ousted if the plaintiff made his purchase for a particular purpose, relying on the selection of the seller and on his skill and judgment. There are many exceptions to that maxim, but none is stronger or clearer than cases coming within section 14 (1) on the facts proved. Amongst the cases where sales for a particular purpose are dealt with none is more interesting than *Jones* v. *Bright* (1). There it was laid down that when goods are ordered from a manufacturer for a particular purpose he impliedly warrants that the goods he supplies are fit for that purpose. Best, C.J., said: "It is not necessary that the seller should say 'I warrant.' It is enough if he says that the article which he sells is fit for a particular purpose. . . . If a man sells an article he thereby warrants that it is merchantable—that it is fit for *some* purpose. If he sells it for a particular purpose he thereby warrants it fit for that purpose." Possibly the case most strongly relied on by the defendant is *Emmerton* v. *Mathews* (2); but there the plaintiff bought the meat on his own inspection; there was no actual warranty and nothing was said about quality. It must be noted that Grove, J., in *Smith* v. *Baker* (3) said that *Emmerton* v.

(1) 5 Bing. 533. (2) 7 H. & N. 586. (3) 40 L. T. (N. S.) 261.

Mathews (1) established the principle that when goods are sold to the order of the purchaser there is an implied warranty that the goods shall be merchantable. I look on another case in the same volume, *Bigge* v. *Parkinson* (2), as an authority supporting the plaintiff's contention. There the plaintiff having entered into an agreement with the East India Company for the conveyance of troops to Bombay, the defendant undertook to supply the plaintiff's troops with stores "guaranteed to pass survey of the East India Company's officers." It was held in the Exchequer Chamber that this express warranty did not exclude the warranty implied by law, that the stores should be reasonably fit for the purpose for which they were intended.

In the present case the question is whether on the facts there is not an implied warranty by the defendant that the crabs were reasonably fit for the purpose for which they were intended—to be used as human food—to be eaten as wholesome food by the plaintiff.

The case of *Brown* v. *Edgington* (3) is important, for the clear judgment of Tindal, C.J., who laid down that if a buyer "relies on the judgment of the seller and informs him of the use to which the article (rope) is to be applied, the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed." In the well-known case of *Laing* v. *Fidgeon* (4), decided in 1802, Gibbs, C.J., stated as clear law that "in every contract to furnish manufactured goods, however low the price, it is an implied term that the goods should be merchantable." In the text-books attention is usually drawn to the cases as laying down that in contracts for provisions it is always implied that they are wholesome, and the old authorities of the law are cited to support the proposition. Martin, B., however, in the case of *Emmerton* v. *Mathews* (1) points out that "there is no difference between the sale of victuals for food and other articles," except for the greater responsibility incurred by sellers of food. In the case of *Beer* v. *Walker* (5) it was held that there was an implied warranty by a London dealer sending

(1) 7 H. & N. 586.
(2) *Ibid.* 955.
(3) 2 M. & G. 279.
(4) 6 Taunt. 108.
(5) 46 L. J. (N. S.) C. P. 677.

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rabbits to a retail dealer at Brighton that the rabbits should be fit for human food when they arrived at Brighton. This case is good sense as well as good law.

After the close of the argument we were referred to a case in *The Times* of November 18 (1), where a Manchester publican was held liable for supplying arsenicated beer to a customer on an implied warranty of the wholesomeness of the beer.

In *Drummond* v. *Van Ingen* (2) Lord Herschell states the following as clearly settled propositions :—" Where goods are ordered of a manufacturer *for a particular purpose* he impliedly warrants that the goods he supplies are fit for that purpose. It is equally well settled that upon a sale of goods of a specified description which the purchaser has no opportunity of examining before the sale, the goods must not only answer that specific description, but must be merchantable under that description. And it was further held that the implied warranty that the goods supplied are merchantable was not absolutely excluded by the fact that the goods were sold by sample, and that the bulk precisely corresponded with it, but was only excluded as regards those matters which the purchaser ought by due diligence in the use of all ordinary and usual means have ascertained from an examination of the sample." Lord Macnaghten in the same case affirmed " the broad proposition that a manufacturer who agrees to supply goods to order knowing the purpose for which they are required thereby impliedly undertakes to supply goods fit for the purpose in view."

It thus appears that the principle relied on by the plaintiff in support of her action is one long familiar to our law, which has in a series of cases recognised that it is legal and reasonable on a sale of articles of food to imply a warranty that they are fit for wholesome human food. The circumstances of the case might enable a seller to defend himself by appealing to the maxim of *caveat emptor*. That appeal, however, would be in vain if the plaintiff was able to prove facts that brought the case within section 14 (1) of the Sale of Goods Act, 1893.

(1) *Wren* v. *Holt*, tried before Wills, J., and a special jury at Manchester Assizes on the 15th Nov., and reported in *The Times* of 18th Nov., 1901.

(2) 12 A. C. 284.

In my view such is the position of the present case. I therefore think that the facts bring the case within section 14 (1), that the plaintiff has proved her case, and is entitled to the damages ascertained.

I accordingly hold that the order of the King's Bench Division is right, and should be affirmed, and the appeal dismissed with costs.

FITZ GIBBON, L.J. :—

In my opinion this case cannot be decided without considering the Mercantile Law Amendment Act (Scotland), 1856, the Sale of Goods Act, 1893, and authorities both before and after these Acts.

At the trial the defendant's counsel called for a direction, but neither party suggested any question for the jury other than those which were submitted. With the findings approved by the Judge, and the inferences of fact from uncontradicted evidence, all facts material to the question of the defendant's liability are before us, and a new trial is out of the case.

In making the contract of sale the plaintiff was represented by her granddaughter, Ellen Donovan, as her messenger, and the defendant was represented by his manager, who prepared and sold the crabs which did the mischief, in the ordinary course of trade.

Miss Donovan asked for "two nice fresh crabs which Mrs. Wallis wanted for her tea." The defendant's manager said that "they had no live crabs in stock, but that he had boiled crabs." He "took up two nice crabs": he was asked "Were they nice and fresh?" He said, "Yes." He selected two, and he "put away" one which Miss Donovan said "looked better," because he "knew by the weight and feel of the crabs that the ones he selected were better." Miss Donovan paid 6*d.* for them, and took them home. The plaintiff, her granddaughter, and her servant ate portions of them, and no one noticed anything wrong in their weight feel appearance smell or taste until after they had been used as food. The evidence of suspicious appearances afterwards observed in the remains should be discounted, and we must assume that whatever rendered them unwholesome

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could not be discovered, either by the seller before the sale, or by the buyer before eating them. But we must equally assume that they were unfit for food, and in fact poisonous. This may have been due to incipient decomposition, but the expert's evidence that this might not be "very perceptible to taste or smell" is corroborated by the proof of the eating. It seems to be a case of ptomaine poisoning—a term used when food proves poisonous from an unknown cause, which may have been something in the feeding keeping or boiling, or some disease. It is the common case of the purchase of an article asked for and sold by its name, selected by a dealer for a customer from a number of similar articles, believed by both parties to be fit for a known purpose for which it is required, but unfit by reason of a latent defect. We must, therefore, face the question—always a hard one—which of two innocent parties is legally responsible for consequences which neither could avoid? The responsibility, if thrown on the seller, is serious, but the injury suffered by the buyer is serious too. The seller got the price; the buyer paid it, and was nearly killed. The law must be the same in the case of two crabs sold for sixpence as in that of any other goods, no matter how costly, bought under similar circumstances. If the seller is not responsible, the buyer must not only bear the consequences; he must also be unable to return the article, to recover back the price, or to refuse to pay; though what he bought was not merely unfit for its purpose, but was worthless and mischievous. These topics can only mislead as to the law, but they show the importance of the case.

It is proved by the evidence for the defendant as clearly as by that for the plaintiff that, so far as skill and judgment were exercised at all in the matter, they were exercised by the seller, and not by the buyer. Though the buyer's messenger had "a reasonable opportunity of examining the crabs at the time of sale," the selection of the poisonous crabs was the act of the seller, who described them as "nice and fresh," and the plaintiff and her messenger both relied on him to select crabs fit for the stated purpose of being used as food. There is no evidence that the plaintiff gave any authority to her messenger, or that her messenger had any skill, exercised any judgment, or undertook

any duty, as to selecting the crabs, and the plaintiff's rights must be the same as if she had sent a written order to the defendant for "two nice fresh crabs for her tea," and had got poisonous crabs instead. But with these facts it must be taken that no exercise of skill or judgment by the seller, and no examination by the buyer, could have detected the defect or avoided the consequences. Which party does the law make liable under these circumstances?

Two statutes deal with that liability, the Mercantile Law Amendment Act (Scotland), 1856, and the Sale of Goods Act, 1893. The first is "An Act to Amend the Laws of Scotland affecting Trade and Commerce"; it applies to Scotland only, but it recites that "inconvenience is felt by reason of the laws of Scotland being in some particulars different from those of England and Ireland in matters of common occurrence in the course of trade, and that with a view to remedy such inconvenience it is expedient to amend the law of Scotland as thereinafter mentioned." This preamble is a parliamentary, though not a legislative, declaration that what is enacted for Scotland was at the time the law of England and Ireland.

Before that Act the law of Scotland as to the sale of goods was the Civil Law. By that law—I quote from Amos (History and Principles of the Civil Law of Rome, p. 227)—"The seller was held to give an implicit guarantee against the existence in the thing sold of all hidden faults or defects which diminished to an appreciable extent its usefulness for the purpose for which it might be presumed the buyer required it." For that law the Act of 1856, section 5, substitutes the following for Scotland:—

> "Where goods shall after the passing of this Act be sold, the seller, if at the time of the sale he was without knowledge that the same were defective or of bad quality, shall not be held to have warranted their quality or sufficiency, but the goods with all faults shall be at the risk of the purchaser unless the seller shall have given an express warranty of the quality or sufficiency of such goods or unless the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered without such warranty to warrant that the same are fit for such purpose."

Judge Chalmers, who drew the Act of 1893, in his note to

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section 14 (1) says that this enactment was intended to assimilate Scottish to English law, though it laid down a narrower rule for the former country; but he says that by the Act of 1893 "a uniform rule is laid down for both countries."

The demand for "nice fresh crabs," with the seller's statement that those which he selected were "nice and fresh," was evidence of an express warranty of their quality. But as warranty depends to some extent on intention, the Judge left the question to the jury, and we are bound by the finding that the defendant "did not expressly warrant them to be fresh and good." This being so, the defendant would not be liable under the Scottish law unless they were "expressly sold for a specified and particular purpose" within the meaning of the Act of 1856.

Similar words appear in the Act of 1893, and they also appear in many authorities before and after both Acts. Therefore they are to some extent terms of art, and in interpreting the Act of 1893 we must have regard to the meaning which they then bore in English law. The Act is entitled "An Act for codifying the law relating to the Sale of Goods"; *prima facie* this imports that it does not change the law, but that it contains the whole law upon the subject.

In *Vagliano's Case* (2), Lord Herschell, speaking of the Bills of Exchange Act, says:—"On any point specifically dealt with by such a statute the law should be ascertained by interpreting the language used, instead of, as before, by roaming over a vast number of authorities in order to discover what the law was. But resort may be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code, and if in a code words be found which have previously acquired a technical meaning the same interpretation might well be put upon them in the code." This remark applies with special force to the Act of 1893, because it purports to codify the existing law, and it is based upon previous decisions, particularly on the judgment of Mellor, J., in *Jones* v. *Just* (3). I venture to add that the other parts of the code should be referred to for the purpose of aiding in the construction of each provision, and that

(1) Chalmers on Sale of Goods Act, 1893, p. 32.
(2) [1891] A. C. 145. (3) L. R. 3 Q. B. 197.

a presumption arises in favour of any interpretation which will make all result in creating the same rights and liabilities under similar circumstances. Sect. 14 (1) has been treated as the clause which governs the case before us. [The Lord Justice read the section.]

The "description" of the goods here was "crabs." This section differs from the Scotch Act in that it makes the seller answerable where the purpose is "made known either expressly or by implication," and that it does not use the word "specified." The buyer here "expressly made known to the seller" that the crabs were required for her own eating on the evening of the sale. By asking for "nice fresh crabs," and by her acts, Miss Donovan showed that she relied on the seller to select them, and the jury have found that she did so rely. Was the purpose thus made known a "particular purpose" within the meaning of the Act? The King's Bench has held that it was, and the Chief Baron has found himself unable to exclude from the Act any purpose which is "stated" at the time of the sale. I find it impossible to exclude any purpose which is "made known to the seller," or "specified," as prescribed in the Acts of 1856 and 1893 respectively. Furthermore, at common law, and in cases both before and after 1893, the seller of food for the known purpose of being used as food has been held answerable if what he sells is from any cause unfit for food. I can find no exception in any case where the buyer relied on the seller's skill or judgment, or where it was left to the seller, and he undertook, to supply food required for a known purpose.

The rule as to the implied warranty on a sale of food was at one time regarded as exceptionally strict against the seller. Chitty's Blackstone (1) says:—"In contracts for provisions it is always implied that they are wholesome." The authorities for this proposition begin with the Year Book, 9 Henry VI., which says (page 53):—

> "If I come to a tavern to eat, and the taverner gives and sells me meat and drink corrupted, whereby I am made very sick, action lies against him without any express warranty, for there is a warranty in law."

(1) 1826, page 166 (a).

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Keilway, 22 Henry VII. (page 91) says:—

> "No man can justify selling corrupt victual, but an action on the case lies against the seller, whether the victual was warranted to be good or not."

In Cro. Jac. (page 196) this is said to be "because it is against the Commonwealth."

Judge Chalmers (1) appears to me to state the effect of subsequent cases correctly when he says:—

> "It was formerly thought that where provisions were sold by a dealer in provisions there was always an implied condition or warranty that they were fit for food, but it was afterwards held that there was no distinction between provisions and any other goods."

The passage which I have quoted from Chitty's Blackstone disappeared from Stephen's Commentaries, but the edition of 1895, two years after the Sale of Goods Act, contains the following in its place with regard to the *soundness* of wares purchased—"The vendor is not bound to answer unless he expressly warrants them to be sound, the maxim in such case being in general *caveat emptor*. But the maxim is subject to qualification, for upon a contract for the purchase of goods of any particular denomination, where the purchaser has no opportunity of inspecting them before they are delivered, there is an implied warranty on the part of the seller that they shall be of a quality saleable in the market under the denomination in question, and, whether there is an opportunity of inspection by the buyer or not, the seller of an ordinary commodity manufactured in the particular instance by himself, and bought for *a known and ordinary purpose*, impliedly warrants (as it should seem) that it has no latent defect to make it unfit for such known and ordinary purpose, and all these principles are recognised by and reformulated in the Sale of Goods Act, 1893, sects. 13-15." The Chief Baron paraphrased "particular" by "stated." Stephen twice paraphrases it by the wider words "known" and "ordinary." I think that it is a synonym for "particularized," and that "specified" in the Scotch Act has the same meaning.

(1) Page 32.

Though Stephen mentions the seller of "an ordinary commodity *manufactured* in the particular instance by himself," both sub-section (1) and sub-section (2) of section 14 make the seller of an article which it is in the course of his business to supply, or in which he deals, equally liable "whether he be the manufacturer or not."

The rule as to goods in general is thus stated by Benjamin (1):

> "If a man buy an article for a particular purpose made known to the seller at the time of the contract, and rely upon the skill or judgment of the seller, there is an implied warranty that the thing sold will be fit for the desired purpose, *aliter* if the buyer purchases on his own judgment (*Brown* v. *Edgington*, 2 M. & G. 279). The warranty extends to latent defects unknown to and even undiscoverable by the vendor, which render the article sold unfit for the purpose intended."

In determining whether the purchase of these crabs was a purchase for a "particular purpose" within the meaning of the Act of 1893, section 14, we must give those words the same meaning which they had in the cases which laid down the law codified by that Act. There is no trace, in any case or text-book in which these words occur or are paraphrased, of the distinction which the defendant's counsel here attempted to make between a general purpose sufficiently definite to be made known to the seller as the *purpose of the purchase*, and any special purpose for which some only of the goods of the description bought would be fit. Nor is there any trace of a distinction between the law applicable to classes of goods *all* of which are useful for one common purpose only, and the law applicable to classes of goods all of which are useful for one common purpose, but some only of which are fit also for some special purpose. I am satisfied that the test whether a sale comes under section 14 (1) or not, is not to be found in the divisibility of the class of goods bought into *genera* and *species*; but that it is to be found in the question whether the purchase, being made for a definite purpose known to the seller, has been made in reliance on his skill and judgment to select or to supply goods fit for that purpose. The attempt to limit the meaning of "particular purpose" now

(1) Benjamin on Sales, p. 652.

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suggested must end in hopeless confusion. Many classes of goods are fit for several purposes; sometimes more or less general, sometimes more or less special. Many other classes of goods are all fit for one purpose only; sometimes more or less general, sometimes more or less special.

All food is required for use as food; some foods are useful for man and beast, some are fit for man only, some only for beast. If I buy meat for human food, is that a general purpose outside the Act? If I buy it for cat's meat, is that a particular purpose within the Act? If I buy a leg of mutton to roast this day week, telling my butcher that I require it for that purpose, is he not responsible if it goes bad next day? If instead of keeping it for a week I eat it next day, will he not be answerable if it poisons me, from inherent unsoundness, six days sooner than if I had postponed the eating of it until the particular day upon which I had told him that I required to use it?

This novel distinction is equally impracticable if rested on a restriction of liability to selected *species* of goods of the same *genus*, for the purposes for which any description of goods may be required may be very general or may be very special. The "purpose of food" may be general but definite. What of food for infants or for invalids? What of sauces? What of drugs? If a customer relies on a trader to supply goods fit for a defined purpose, and he gives goods which are fit for nothing, his responsibility cannot depend upon his knowledge that they were required for a purpose peculiar to the individual purchaser; it must depend upon his having sold them, in the words of Stephen, "for the ordinary and known purpose for which they were required." The law must be the same if I buy a cycle to ride on ordinary roads, or if I buy a cycle to ride on a racing track, provided the seller knows the purpose for which I require it, if it breaks from a cause which makes it unfit to ride anywhere.

The Act makes the seller liable for undiscoverable defects in cases other than those which come within section 14, sub-section 1. Sub-section 2 provides that "where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not) there is an implied condition that they shall be of merchantable

quality, provided that if the buyer has examined the goods there shall be no implied condition as regards *defects which such examination ought to have revealed.*"

In my opinion the purchase in this case came within this sub-section; the goods were bought by the description of "nice fresh crabs for tea"; the buyer did not examine them; if she had, such examination could not have revealed the defect; and the Act makes the seller answerable for all defects which examination could not reveal. But as the case has been dealt with under sub-section 1, I so treat it.

Section 15 enacts that in "the case of a contract for sale by sample there is an implied condition—(*a*) that the bulk shall correspond with the sample in quality; (*b*) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; and (*c*) that the goods shall be free from any defect, rendering them unmerchantable *which would not be apparent on reasonable examination of the sample.*" This is the law laid down by *Mody* v. *Gregson* (1), adopted and explained by the House of Lords in *Drummond* v. *Van Ingen* (2). If Miss Donovan, finding that boiled crabs only were to be had, had taken a boiled crab as a sample to the plaintiff, and she had sent back for "two crabs like that," the defendant would have been responsible for the undiscoverable defect under sect. 15. How can his responsibility under sect. 14 (1) be different when she bid him send her "two nice fresh crabs for her tea"?

It was contended that a decision against the defendant here would leave no case to which "*caveat emptor*" could apply. My answer is that "*caveat emptor*" does not apply, and that the buyer's "opportunity for inspection" is immaterial, in any case in which the skill or judgment of the seller is relied on to supply goods required for a purpose which is made known to him at the time of the sale—*i.e.* in any case within sect. 14 (1), or in any case within sect. 14 (2), or sect. 15. "*Caveat emptor*" does not mean—in law or Latin—that the buyer must "take *chance*"; it means that he must "take *care.*" It applies to the purchase of specific things, *e.g.* a horse or a picture, upon which the buyer can, and usually does, exercise his own judgment; it applies also whenever the

(1) L. R. 4 Ex. 49. (2) 12 A. C. 284.

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buyer voluntarily chooses what he buys; it applies also where, by usage or otherwise, it is a term of the contract, express or implied, that the buyer shall not rely on the skill or judgment of the seller. But it has no application to any case in which the seller has undertaken, and the buyer has left it to the seller, to supply goods to be used for a purpose known to both parties at the time of the sale. The jury have found that this was such a case, and therefore in my opinion the judgment for the plaintiff is right, equally at common law, and under the Sale of Goods Act.

I shall not "roam over a vast number of authorities," but I must refer to some for the purpose of distinguishing them, and to others to establish the principle upon which my decision rests.

In *Burnby* v. *Bollett* (1) the defendant was held not liable, because "he had not exposed the unsound pig for sale," because it was "not found that he bought it for sale," because "he was not a dealer in meat," and because it was "not the case of a butcher, or taverner, or farmer killing or exposing to sale meat in open market, who may be reasonably taken as impliedly warranting the meat to be sound." Parke, B. (2), read the note of Lord Hale in 1 Fitzh. Nat. Br. 94, that "there is diversity between selling corrupt wines *as merchandise*, for there an action on the case does not lie without warranty; otherwise, if it be for a *taverner or victualler*, if it prejudices any," and he said that "the defendant was not dealing in the way of a common trade," and therefore fell "within the reason of the former part of Lord Hale's distinction, and there being no evidence of a warranty, or of any fraud, he was not liable." This case falls within the latter part of Lord Hale's distinction, and therefore *Burnby* v. *Bollett* (1) is an authority that it is "otherwise."

The defendant's counsel chiefly relied on *Emmerton* v. *Mathews* (3). At 5 L. T. N. S. 681, Pollock, C.B., is reported as saying that "the plaintiff (who was a butcher) *bought on his own inspection*, with no actual warranty, nor was anything said (by the defendant) about the quality." At 7 H. & N. 589, Martin, B., quoted *Burnby* v. *Bollett* (1) to show that "there is no difference between the sale of victuals for food and other articles, except that

(1) 16 M. & W. 644. (2) Page 653. (3) 5 L. T. (N. S.) 681; 7 H. & N. 586.

dealers in victuals are not merely responsible under the same circumstances as the dealers in other articles, but are *also* liable to punishment for selling corrupt goods"; and Pollock, C.B., exonerated the defendant from the warranty which the law implied on the sale of articles to be used as food for man that they were fit for that purpose, because he was not a victualler, but a *salesman* offering for sale a carcase with a defect of which he was not only ignorant, but had not means of knowledge (the defect being latent), and was not liable to any penalty, and therefore did not, as a matter of law, impliedly warrant that the carcase was fit for human food.

These Judges would plainly have held the defendant "responsible" if he had been a victualler, who, in the course of his business, had sold unsound meat on a representation that it was "nice and fresh," to a customer who relied on him to give meat fit for the purpose for which it was known to be required.

In *Bigge* v. *Parkinson* (1), in the same volume, the Exchequer Chamber held that the special warranty that the provisions should pass survey was "in addition to the implied warranty that they should be fit for the purpose intended," namely, food for troops. Though the buyer there had no "opportunity of inspection," *Jones* v. *Bright* (2) shows that this is immaterial where the purchaser buys for a "particular purpose" known to the seller, and leaves it to him to supply goods fit for that purpose. Best, C.J., says:—

> "It is not necessary that the seller should say, 'I warrant'; it is enough if he says that the article which he sells is fit for a particular purpose. If a man sells generally, he undertakes that the article sold shall be fit for some purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose."

Parke, J., says:—"It has been argued that the plaintiff had inspection here; but it was merely of the exterior of the commodity, and he had no means of knowing its intrinsic qualities" —a pregnant observation to show that inspection which can discover nothing is immaterial, and that opportunity for inspection is immaterial where the seller's judgment or skill is relied on.

(1) 7 H. & N. 955. (2) 5 Bing. 533.

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Smith v. *Baker* (1) merely followed *Emmerton* v. *Mathews* (2) in holding a *salesman* of meat not responsible for a latent defect where the *purchaser selected it himself*. Grove, J., treated the principle as established by "a long roll of cases, that where goods are sold to the order of the purchaser there is an implied warranty that the goods shall be merchantable"; he mentioned the exception of sales of *specific articles* where the purchaser has had an opportunity of inspection. But he concluded his judgment with the following passage, which appears to me to apply directly here:—"In this case if the butcher (the plaintiff) *had not gone and selected his meat*, but had ordered it, there would have been *no doubt an implied warranty on the part of the butcher* (the defendant) *that it was of merchantable quality*."

In *Beer* v. *Walker* (3) a purchase of rabbits from a London dealer by a Brighton retailer, for the purpose of being retailed at Brighton, was held to be a "particular purpose," which, being known to the seller, was covered by an implied warranty. It is inconsistent with the contention that a purchase of "nice fresh crabs for tea" is *not* a "particular purpose," and it was followed in *Burrows* v. *Smith* (4) in 1894, after the passing of the Sale of Goods Act, 1893, by Mathew and Collins, JJ., who held that "though there was no express warranty, and no fraud, *Beer* v. *Walker* (3) showed that there was an implied warranty in such a case, and that, indeed, an authority was hardly necessary to show that there was such a warranty *on the sale of food*."

During the argument we asked whether the sellers of arsenicated beer would be liable for poisoning their customers, and the defendant's counsel answered that no one had ventured to make them so. Immediately afterwards a case (5) appeared in *The Times* (Nov. 18th, 1901), where a Manchester publican was sued by a bibulous bricklayer for breach of an implied warranty in the sale of beer across the counter, whereof the plaintiff drank six pints daily, and nine or ten pints at the week-end, until he was arsenically poisoned. The jury found that his illness was caused

(1) 40 L. T. (N. S.) 261.
(2) 7 H. & N. 586.
(3) 46 L. J. (N. S.) C. P. 677.
(4) 10 *Times* Rep. 246.
(5) *Wren* v. *Holt*, tried before Wills, J., and a special jury at Manchester Assizes on the 15th Nov., and reported in *The Times* of the 18th Nov., 1901.

to a large extent by arsenicated beer, but contributed to by his drinking habits, and they awarded him £50 damages. The Judge left the question to the jury whether the plaintiff was relying on the skill or judgment of the publican in selecting the beer—they found that *he was not*; yet the Judge, notwithstanding, held him liable on the implied warranty, and gave judgment for the plaintiff. Unless that judgment is wrong, and unless both Judge and counsel overlooked the defence now set up, a publican selling beer to a customer impliedly warrants that it is wholesome, and is responsible for a defect discoverable only by a chemical examination which no publican could make.

By statute a dealer in the course of his business is in the same position as a manufacturer, and therefore nothing turns on beer being a manufactured article. If the publican had a remedy against the brewer, and the brewer against the maker of the glucose which contained the arsenic, this would carry the responsibility back to rest ultimately upon an implied warranty that the glucose was fit for use as an ingredient of human food. This is the latest case of a sale of food.

In *Gardiner* v. *Gray* (1), *Laing* v. *Fidgeon* (2), *Jones v. Bright* (3), and *Okell* v. *Smith* (4), the seller was held "bound to furnish a commodity that will answer the purpose for which it is sold." The goods sold were "waste silk," "saddles," "copper for sheathing a ship," and "copper pans," yet no one suggested that it was material to particularize the purpose for which they were required further than by making it known to the seller. How can a purchase of "saddles" to be ridden on, be "a particular purpose," if a purchase of crabs to be eaten is not?

In *Brown* v. *Edgington* (5), on the sale of a rope for a special purpose, Tindal, C.J., "both in reason and on authority" held that if a buyer "relies upon the judgment of the seller, and informs him of *the use to which the article is to be applied*, the transaction carries with it an implied warranty, that the thing furnished shall be fit and proper for *the purpose for which it was designed*." Bosanquet, J., and Erskine, J., held the seller liable because he was informed of

(1) 4 Camp. 144.
(2) 6 Taunt. 108.
(3) 5 Bing. 533.
(4) 1 Stark. 107.
(5) 2 M. & G. 279, 290.

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"the purpose for which the article was wanted," and Maule, J., made the test of the seller's liability "the fact of his knowledge of the purpose for which the article sold was required."

In *Jones* v. *Just* (1) all the cases were reviewed, and *Turner* v. *Mucklow* (2) was distinguished because the buyer had bought the "spent madder" for a special purpose, *not known to the seller*, and knew that it was refuse, and that it was not manufactured for sale. But it was laid down that although there is not "in general, on the sale of goods in England to be supplied, an implied warranty that they shall be of any particular quality or sufficiency *for any particular purpose*," there is a warranty "that they shall be merchantable goods of the *description* bargained for."

This passage is the key to section 14 (1) of the Act of 1893. I cannot conceive that the words "particular purpose" in that section can be so interpreted as to deprive a purchaser of the benefit of the implied warranty that goods are fit for the purpose for which the seller knows that they are required, and are merchantable; or that a known and ordinary purpose is not "particular," because it is the only purpose for which goods of that description can be required.

Randall v. *Newson* (3) was the case of a carriage pole, and the Exchequer Chamber reversed the Queen's Bench which had applied between buyer and seller the principle which *Readhead's Case* (4) had laid down for carrier and passenger. Brett, L.J., held the seller liable for a defect which "no care or skill could discover," on the general principle that, if the subject-matter of a bargain of purchase and sale be a commercial commodity, the undertaking is that the thing delivered "shall be that commodity, *saleable or merchantable*."

In *Drummond* v. *Van Ingen* (5) the Court of Appeal and the House of Lords held that the sellers were liable for a defect not discoverable by due diligence on inspection. Lord Herschell held the purchaser entitled to trust to the skill of the manufacturer; that there is an implied warranty that the article shall be fit for use in the manner in which goods of the same general character

(1) L. R. 3 Q. B. 197.
(2) 8 Jur. (N. S.) 870.
(3) 2 Q. B. Div. 102.
(4) L. R. 4 Q. B. 379.
(5) 12 A. C. 284.

ordinarily would be used; that where the article does not comply with such a warranty, it may properly be said to be unmerchantable in the sense in which that word is used in relation to transactions of this nature; and that when a purchaser *states generally* the nature of the article he requires, he trusts to the skill of the manufacturer, and he has a right to rely on the samples supplied representing an article which will be fit for the purpose for which such article is ordinarily used.

Lord Macnaghten saw "no substantial distinction" between the facts of that case and the facts in *Jones* v. *Bright* (1), and he rejected "the stock argument" that the effect of the decision in favour of the buyer would be to hamper trade, and to cast on manufacturers a burden which had not been cast on them hitherto.

I abstain from further references, because those which I have quoted are, in my opinion, enough to show that the defence set up here has no foundation.

WALKER, L.J.:—

This case raises an important question under the Sale of Goods Act, and I confess that my opinion, as to what our order should be, fluctuated during the argument and for some time after it, on account of the possibly far-reaching consequences to the retail dealer of a judgment for the plaintiff.

The facts, on the finding of the jury, are simple. The plaintiff wanted some crabs for use at her supper, and she sent her messenger to procure them at the shop of the defendant, a fishmonger, part of whose business was to sell crabs. The messenger made known to the defendant through his representative in the shop that she wanted crabs to be used for eating, and she asked for nice fresh crabs. She had a reasonable opportunity of examining the crabs at the time if she chose to exercise it, but he selected them, and she relied on the skill of the seller to select fresh and reasonably fit crabs for the purpose for which she required them, and made the purchase on his judgment. The defendant did not expressly warrant that the crabs were fresh and good, but he honestly believed that they were fresh and fit for food. We must assume on the findings of the jury that the

(1) 5 Bing. 533.

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crabs were not fit for food, and that the plaintiff suffered serious injury from the eating of them. The defect in the crabs was a latent one, undiscoverable by either party by outward appearances, and the defendant acted in perfect good faith, and thus the question arises between two innocent parties as to which of them the loss is to fall on.

On the part of the defendant it is contended that at common law the case falls within the first of the classifications mentioned by Mellor, J., in *Jones* v. *Just* (1), "where goods are *in esse* and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor the manufacturer: *Parkinson* v. *Lee* (2). The buyer in such a case has the opportunity of exercising his judgment upon the matter, and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may if he chooses require a warranty. In such a case it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable." The judgment of the Lord Chief Baron proceeds on the assumption that the rule would apply if the case rested on the common law doctrine, and the Sale of Goods Act had not passed.

The plaintiff's counsel first meets that argument on the common law liability by reviving the old controversy whether in the case of a sale of provisions by a dealer in them there is not an implied condition or warranty that they are fit for food, and he asserts that such a warranty does exist. Every old authority bearing on that question, from the Year Books to Chitty's Blackstone, is stated at length in the argument in the case of *Burnby* v. *Bollett* (3), and it would serve no useful purpose to review them. In *Burnby* v. *Bollett* (3) the carcase of a pig was exposed for sale in a public street in Lincoln, in the shop of one Penrose, a butcher, and the defendant bought it, but left it hanging in the shop. The plaintiff applied at the shop to buy it, but being told the defendant was the owner, he applied to

(1) L. R. 3 Q. B. at p. 202. (2) 2 East, 314. (3) 16 M. & W. 644.

him and bought it from him, thus taking a transfer of his bargain. The pig was unfit for food, but the defendant had no knowledge of this, and he was not a butcher or dealer in meat. The decision in favour of the defendant was rested on the fact of his not being a dealer, and the other question was not necessary to be decided, though the opinion of Parke, B., who delivered the judgment, seems to have been hostile to the plaintiff.

But in *Emmerton* v. *Mathews* (1) the defendant was a salesman, who sold meat in the public market, and he sold to the plaintiff, a butcher, beef which through a latent defect was unfit for food. The case states that "the plaintiff bought it on his own inspection, and there was no actual warranty, nor was anything said about the quality." The case was very fully argued upon the special question which I am now considering, and Pollock, C.B., in a considered judgment, says:—"We have taken time to consider our judgment, because it was contended on the argument, that in all cases of the sale of articles to be used as food for man the law implied a warranty that they were fit for the purpose. Another ground was that it was penal to expose meat for sale which was unfit for human food. Any legal point which in the remotest degree bears upon the public health and the general safety of the community is deserving of the fullest consideration; but having given that consideration, we are of opinion that there is no case that at all governs the present. None of the cases cited at the Bar decide this case, though in *Burnby* v. *Bollett* (2) all the law is collected, and the matter was much discussed; and that a salesman offering for sale a carcase, with a defect of which he is not only ignorant, but has not any means of knowledge (the defect being latent), is not liable to any penalty, and does not as a matter of law impliedly warrant that the carcase is fit for human food, and is not bound to refund the price, should it turn out to be so."

The same point arose under almost precisely similar circumstances in *Smith* v. *Baker* (3). The plaintiff was a retail butcher, and he bought the meat in the market, where it was exposed for sale. As the judgment was in favour of the seller, this case also

(1) 7 H. & N. 586. (2) 16 M. & W. 644. (3) 40 L. T. (N. S.) 261.

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proceeds on the assumption that there was no implied warranty by reason of the article sold being food. But in order that it may not be necessary to recur to the case again, I must mention a ground of the judgment put forward by both Grove, J., and Lopes, J. Grove, J., says: "He went into the market and inspected the meat"; and Lopes, J., says: "There was, therefore, the fullest opportunity of inspection and personal examination of the meat if the plaintiff desired it. The plaintiff selected the meat for himself. It was not the defendant who selected it for him: he relied on his own judgment." Thus we have this common factor in *Emmerton* v. *Mathews* (1) and *Smith* v. *Baker* (2). Grove, J., makes one other important observation, having regard to the cases, which I shall mention: "In this case, if the butcher had not gone and selected his meat, but had ordered it, there would have been no doubt an implied warranty on the part of the butcher that it was of merchantable quality."

I am of opinion that the contention on behalf of the defendant is right, so far as regards the point of there being at common law an implied warranty of quality or merchantableness in every case of the sale of an article of food *in esse*.

The next question is whether the first of Mellor, J.'s, rules applies, where the facts are as they are found in this case to be. The two cases most relied on for the defendant contain the element that the purchaser bought on his own judgment and inspection, and not on the judgment and selection of the seller. In the present case the plaintiff's representative took the crabs on the seller's judgment, coupled with the knowledge on his part that the crabs were to be used for food, and though there was an opportunity for inspection by the purchaser, it was not used or made a factor in the purchase.

If Mrs. Wallis had sent up a written message to the defendant, containing an order for crabs for her supper, there would have been clearly an implied warranty, I think, of merchantableness, just as in the case put by Grove, J., of the order by the butcher for meat. In such a case the opportunity for personal inspection

(1) 7 H. & N. 586. (2) 40 L. T. (N. S.) 261.

and selection by the buyer does not arise, and it is to this head a number of cases are referable, such as *Bigge* v. *Parkinson* (1), a contract to supply provisions for troop stores, where Cockburn, C.J., says:—"When a buyer buys a specific article, the maxim *caveat emptor* applies, but where the buyer orders goods to be supplied, and trusts to the judgment of the seller to select goods which shall be applicable to the purpose for which they are ordered, there is an implied warranty that they shall be reasonably fit for the purpose, and I see no reason why the same warranty should not be comprehended in a contract for the sale of provisions." The case of *Beer* v. *Walker* (2)—a contract by a wholesale dealer to send rabbits weekly from London to Brighton, and *Burrows* v. *Smith* (3)—a contract to send by train 80 old partridges,—falls within the same category, and furnish no aid, in my opinion, upon the point we have to decide. They rest upon the old principle stated by Lord Ellenborough in *Gardiner* v. *Gray* (4), "when there is no opportunity to inspect the commodity the maxim *caveat emptor* does not apply."

But passing away from those latter cases to the one we have to deal with—the purchase as a specific article—do the cases of *Emmerton* v. *Mathews* (5) and *Smith* v. *Baker* (6) apply to a case when the purchase of a specific article—and an article of food is only an illustration—is made on the judgment of the seller appealed to and trusted by the buyer? The purchaser's reliance on that diverts him from the exercise of any judgment of his own, and from requiring a warranty, as he might, in a case of doubt. It is true that he has an opportunity for the exercise of his (the purchaser's) judgment, which was not availed of, but if crabs for food are asked for, and the seller selects them as suitable for the purpose, the purchaser does not get what he trusted the seller to give him. There is certainly no authority that in such a case the seller is not as between two innocent parties to be the one to suffer, and on principle it seems like the case where he gets an order to send crabs.

The question of the classification mentioned in *Jones* v.

(1) 7 H. & N. 955.
(2) 46 L. J. (N. S.) C. P. 677.
(3) 10 *Times* R. 246.
(4) 4 Camp. 144.
(5) 7 H. & N. 586.
(6) 40 L. T. (N. S.) 261.

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Just (1) is "when a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied. In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment, and not upon his own." Illustrations of this rule are to be found in *Jones* v. *Bright* (2), a purchase of copper for sheathing a vessel: *Brown* v. *Edgington* (3); and *Randall* v. *Newson* (4), a purchase of a carriage pole. The thing supplied must be the article, and also reasonably fit for the particular purpose, and there is no exception of latent undiscoverable defects.

Various difficulties were suggested during the argument as to applying to this case the fourth rule of Mellor, J.'s, classification. The answer may be, I think, that the action of the seller has turned the scale, and that, having been asked for food for man, he has given it as such, and for that purpose, and as between two innocent parties, the loss should fall on the seller just as much, as if he had supplied an order sent him, and that on principle the case should, independently of the Sale of Goods Act, come within the spirit of the 4th of Mellor, J.'s, classification; but it is really unnecessary to decide that point, for if the Sale of Goods Act meets the case the verdict for the plaintiff should stand, whether the Sale of Goods Act adopted the law as contended by the plaintiff, or made it law.

The Chief Baron decided in favour of the plaintiff on the construction of the Act, and, I think, he was right, and for that reason I pronounce no definite opinion upon the question how the matter would have stood at common law.

We should approach the consideration of the Sale of Goods Act with the knowledge of the existing law, but when the language is clear, that language only can be used to determine any question in controversy. As might be expected in a codifying statute most at all events of its provisions are declaratory of the existing

(1) L. R. 3 Q. B. 197.
(2) 5 Bing. 533.
(3) 2 M. & G. 292.
(4) 2 Q. B. Div. 102.

law. Sections 13 and 15 are instances of it, as we see from the statement of the then law in the judgment of Lord Herschell in *Drummond* v. *Van Ingen* (1) delivered on the 2nd April, 1887.

The 12th section contains a declaration on three matters, two of which, so far as I can see, had not been absolutely settled. The 14th section, sub-section (1), is the one with which we are immediately concerned. Sub-sections 2, 3, and 4 of section 14 are declaratory of the law as stated in existing decisions, and in my opinion the cases of sale of goods by description, and sale of goods by sample, and the law applicable to such, give us no help whatever on the case of sale of goods *in esse* legislated for by the first sub-section.

Coming back then to that sub-section, it appears by the definitions in the Act, which we must read into the section, that "goods" are equivalent to, or include, goods *in esse*, and include articles of food. The term "contract of sale" includes a sale, which passes the property, as well as an agreement to sell. It is plain also on the section that "seller" includes a dealer as well as a manufacturer, and it is equally plain that crabs are of a description which it was in the course of the seller's business to supply. With this assistance we approach the words of the sub-section. The first portion of it negatives the existence of any implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except, &c., thus preserving the rule of *caveat emptor*, save in the excepted cases. The first of these is—"where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose." It is plain at all events that the sub-section applies to a case where there are more purposes than one to which the goods may be applied. Is it in the matter now under consideration confined to that? The buyer has made known to the seller the purpose for which the goods are required, viz. for eating, and she has, as found

(1) 12 A. C. 284.

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by the jury, made that known in a manner which showed that she relied on the seller's skill and judgment, and not on her own, for having that purpose attained; and the question comes round to this—whether the words "any particular purpose" in the first branch of the section and "the particular purpose" in the next are satisfied by a statement (expressly or impliedly made) that they were to be used for food, which would really be their only practical use? Why for that reason is it the less the particular purpose for which the goods are required? It is the actual purpose, and it is the named and specified one; and the naming of it brings into play the skill and judgment of the seller as the condition on which the fitness for that purpose as between the parties is made to depend. The implied warranty no doubt includes latent defects, but as between two innocent parties there is nothing unreasonable as a choice in making the loss fall on the one who throws his skill and judgment into the scale of fitness. It would, I think, plainly do so where there are several purposes to which the goods may be applied, and would involve then a warranty against unknown and latent defects. An order sent to the shop which was executed would involve the seller in all the same risks and consequences.

It really comes to this that to protect the defendant we must say that the purpose named was not a "particular purpose." Why is it not? It makes the seller's skill and judgment just as important factors as if there were many purposes to which the goods might be applied, and that element contributed by the seller seems enough in my view to turn the scale as between two innocent parties, one of whom must suffer. In any event I think the language of the section, which in result must be accepted as our guide, determines the question, and establishes on the findings the liability of the defendant in this case.

HOLMES, L. J.:—

The question which the Court is asked to decide in this case is whether a fishmonger, who sells over his counter two boiled crabs to a customer, gives an implied warranty that they are fit for use as human food. This question is raised by a state of facts free from complication. Although the issue as to the quality of the goods left to the jury combined the element of

freshness with fitness for food, there was not only no evidence to show that the crabs had become tainted or decomposed by reason of their having been kept an undue time after they were caught; but there was a strong body of testimony the other way. The crabs purchased by the defendant formed part of a consignment received by the fishmonger the day before the sale. When delivered they were all alive, and thirty of them were killed with a view to, and immediately before, their being boiled. Twenty-six of them, that have been traced, were proved to have been eaten without injurious consequences; and although one, or both, of those sold to the defendant was or were unfit for food, it is impossible to say with certainty what was the cause of such unfitness. Whatever it arose from, it was not discovered by either vendor or purchaser. Not only did the defendant, according to the finding of the jury, honestly believe the crabs to be fit for food, but there seems to have been no way except perhaps by opening them, and thus rendering them unmerchantable, by which it was possible for anyone, however skilful, to find out their condition. The three persons who partook of them noticed nothing unusual in their taste or smell; and at the time of sale they undoubtedly presented the appearance of good wholesome crabs.

There was nothing peculiar in the circumstances attending the purchase. The jury negatived the only express warranty suggested by the evidence, and the transaction was the ordinary one of a person buying in a shop specific goods then and there delivered, paid for, and carried away.

The degree of inspection which a purchaser gives to what is thus bought varies greatly. It depends to a certain extent on the thing itself. Articles of dress or ornament, the selection of which is largely governed by individual taste, receive for the most part careful examination. It also depends upon the buyer, whether he is keen or easy-going, in haste or at leisure, possessed of, or without, special knowledge. But whether he avails himself of it or not, he is given the opportunity of forming his own opinion on the quality of the goods before the sale is completed.

In the purchase of boiled crabs which appear outwardly sound and good, there is little room for skill or judgment. They

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are probably chosen by size or weight; and the buyer in this case pointed out one that seemed larger than those offered to her, but on the shopman saying that it was lighter she did not take it. We have thus the question of implied warranty on the sale of specific goods, which there was an opportunity of inspecting at the time of sale, raised in the simplest and most elementary shape.

A young lawyer might think it was a case for applying the rule of *caveat emptor*; but with more experience he would know that a Latin maxim goes but a short way towards solving legal difficulties. The case was treated in the Divisional Court, and in the argument here, as turning entirely upon the construction of section 14 of the Sale of Goods Act, 1893; and although at one time I entertained doubt on this point, I am now satisfied that this is the true mode of dealing with it.

It might be expected that a statute, the object of which, as declared by its extended title, was to codify the law relating to the sale of goods, would provide exhaustively for implied warranties or conditions arising from or incorporated with the contract of sale; and I am of opinion that everything needed for the purpose of determining this appeal is to be found within it. The 14th section enacts that, subject to the provisions of that and other Acts, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as therein specified. The jury having negatived an express warranty, it is necessary for the plaintiff to show that there was some implied warranty or condition; and the only implied warranty or condition that would entitle the plaintiff to a verdict must be either as to the quality of the goods, or as to their fitness for a particular purpose. A warranty that the crabs were merchantable, or that they were fit for food, would or *might* sustain the action; but these would be warranties as to their quality, and therefore covered by the negative portion of the 14th section. The plaintiff is therefore obliged to show that her cause of action arises under the provisions of the Act of 1893, or of some other statute in that behalf.

There are specific provisions in sections 13, 14, and 15 relating to two kinds of contract of sale—one called a sale

by sample; the other called a contract for the sale of goods by description; and it is to be noted that in the first class there is an implied condition that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample; while in the second class there is in a certain state of circumstances an implied condition that the goods shall be of merchantable quality. As the sale in this case was certainly not a sale by sample, there is no need to refer further to the provisions that deal therewith; but Mr. Bourke, after arguing at length upon sub-section 1 of section 14, concluded by saying that sub-section 2, quite independently of the preceding clause, gave him a cause of action upon which, if necessary, he was prepared to rely. I can find no reference to such a proposition in the judgment of Palles, C.B.; but although it was not presented to this Court with much conviction, it ought not to be passed over in silence. I am of opinion that, having regard to the evidence and findings of the jury, there was in this case no sale by description within the meaning of section 13 or of section 14, sub-section 2. Before the passing of the Act of 1893, sale of goods by description was often referred to by Judges in contradistinction to a sale of specific goods, shown and delivered to the buyer at the time of purchase. I do not suggest that this is conclusive as to the meaning of the same words when used in the statute. Indeed, the language of section 14, sub-section 2, appears to show that goods *in esse*, and examined at the time of sale, may be brought within its meaning. But where a customer buying an article in a shop gives no description of it beyond asking for it by its usual name, and the article thus asked for is delivered and carried away, such a purchase in ordinary parlance would not be a purchase of goods by description. If the crabs in this case were sold by description, no sale otherwise than by description would be possible. The 13th, 14th, and 15th sections of the Act may doubtless be construed as dividing all sales of goods into sales by sample, or sales by description, the result of which would be that in every sale there would be an implied warranty against latent defects undiscoverable by examination. But this would in

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my opinion be a forced and unnatural interpretation of the language. It would, moreover, have the effect of making a fundamental change in the law as it existed previous to the Act. I think I am justified in saying that under the common law the purchaser of a specific chattel delivered to him at the time of sale takes the risk of a latent defect, at least where the seller is neither the grower nor the manufacturer. This is in effect the first of the five propositions laid down by Mellor, J., in his well-considered judgment in *Jones* v. *Just* (1), a judgment which can be shown by internal evidence to have been present to the mind of the draftsman of the Sale of Goods Act.

I may also refer in support of my proposition as to the common law on this subject to the 5th section of the Mercantile Law Amendment Act (Scotland), 1856. It appears from the preamble of that statute that its object was to remedy the inconvenience arising from the laws of Scotland being in some particulars different from those in England and Ireland in matters of common occurrence in the course of trade. One of these differences was presumably corrected by the 5th section, which enacts "where goods shall be sold, the seller if at the time of the sale he was without knowledge that the same were defective or of bad quality shall not be held to have warranted their quality or sufficiency, but the goods with all faults shall be at the risk of the purchaser," except in certain cases to which I shall hereafter refer. A codifying Act may, and sometimes does, change the law; but if the intention was to make such an important alteration as this, I should have expected it to have been expressed with clearness and precision. Although the possibility of the present action being determined under sub-section 2 does not appear to have been present to the mind of the Lord Chief Justice at the trial, or to the Divisional Court, I have dealt with the point in some detail, not so much by reason of Mr. Bourke's casual reference to it, as because it has caused me considerable difficulty, especially as it seems to have been recently held at

(1) L. R. 3 Q. B. 197.

the Manchester Assizes that a publican selling a glass of beer across the counter gives an implied warranty that it is of merchantable quality (1).

I come now to the preceding sub-section, upon which Palles, C.B., rested his judgment. This provision has been read more than once; and I can state my view of its construction with comparative brevity. An argument that the sub-section only refers to manufactured goods, which was considered in great detail by the Lord Chief Baron, has not been used in this Court. It has, however, been argued that the provision does not apply to goods *in esse* passing by delivery at the time of sale; but the only answer that need be given to this proposition is to read the clause which *prima facie* refers to all sales of goods, and which contains nothing to suggest a limitation that would be in my opinion arbitrary and artificial. The true question is, what is meant by "a particular purpose"? and here, again, there is, I think, no necessity to go beyond the language of the Legislature. There are many classes of goods which are sold and used for different purposes, and the selection of an article out of the class depends upon the special purpose for which it is needed. Horses, for example, are purchased to be used as beasts of draught, or burden; and this might be described as the general purpose for which they are required. But one man is looking for a racehorse, another for a hunter, a third for a polo pony, a fourth that it may be used in a brougham or a plough. Each of these may be described as the particular purpose for which the horse is bought. Or let me take an illustration from articles of food. I ask a vendor of fruit to show me some apples, and I tell him that they are for a special purpose. If I say that they are to make up a dessert dish for that day's dinner, or to be stored during the winter, or to be converted into cider, or to be cooked in a pie or pudding, he understands me, and he produces apples which he believes to be suited for the purpose indicated. These cases suggest one construction of sub-section 1—a construction which emphasises "particular" as contrasted with "general," much in the same way as *species* is distinguished from *genus*. The language is capable of this

(1) *Wren* v. *Holt*, reported in *The Times*, 18th November, 1901.

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interpretation, and some reasons can be offered for adopting it. Probably the most plausible one is to be found in the source from which the wording of the provision is derived. The sub-section is a paraphrase of the fourth proposition laid down by Mellor, J., in his judgment in *Jones* v. *Just* (1), already quoted; and the learned Judge left little doubt of his meaning by the authorities with which he illustrated it—*Jones* v. *Bright* (2), where the article sold was copper sheathing, which the seller was informed was for the buyer's ship; and *Brown* v. *Edgington* (3), where the purchaser required a rope to be used to raise barrels of wine from a cellar.

I am also disposed to think that the 5th section of the Scotch Act of 1856, which I have already mentioned, points in the same direction. The provision in it that goods with latent defects shall be at the risk of the purchaser is subject to an exception in the following words:—"Unless the seller shall have given an express warranty of the quality or sufficiency of such goods, or unless the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered to warrant that the same are fit for such purpose." Perhaps, however, the strongest argument in favour of construing "particular purpose" as something different from what I may call the generic use of the purchased article is that the implied warranty only arises where the buyer expressly, or by implication, makes known to the seller the particular purpose for which the goods are required. It savours of absurdity that where an article, such as a razor, is to the knowledge of both buyer and seller only bought for one purpose, an implied warranty should depend in any degree upon the buyer making known to the seller something which not only the latter knows already, but which also forms part of the common knowledge of mankind.

I have stated the arguments urged on behalf of the appellant that seem to me most deserving of consideration, and I willingly admit their force. It has been after great fluctuation of mind that I have decided to reject them, and even now I am not sure that I have not misunderstood the intention and misinterpreted the language of the Legislature. The construction of the sub-section

(1) L. R. 3 Q. B. 197. (2) 5 Bing. 533. (3) 2 M. & G. 279.

must be gathered from all its parts; and I think that the key that unlocks the meaning of "particular purpose" may be found in the words "so as to show that the buyer relies on the seller's skill and judgment." I have already said that, according to our law as it stood previous to 1893, when there was a sale of a specific chattel produced at the time of sale, and then and there handed over to the purchaser, there was in the absence of comment or observation on either side no implied warranty against either patent or latent defects. There were no doubt exceptions to this rule founded on special circumstances, but I think I have stated the general principle correctly; and I have no reason to believe that it has been altered by the Sale of Goods Act. But it rarely happens that articles are thus sold in silence. There is generally some conversation accompanying the sale, which may either amount to an express warranty, or, if it falls short of that, supplies grounds from which a warranty may be implied. Section 14, sub-sect. 1, enacts that this implication will arise when the buyer directs the attention of the seller to the purpose for which the goods are required in such a way as to convey that he is relying on the seller's skill and judgment to select a suitable article.

I am unable to conceive any intelligible reason for drawing, in such a case, a distinction between the sale of an article which may be used for several purposes and of an article which can only be used for one. The skill and judgment of a person whose business is to deal in the goods is as likely to be appealed to in the one case as in the other. If a purchaser of apples, by calling attention to the fact that they are wanted for dessert, secures a warranty that the fruit supplied is fit therefor, the warranty is broken whether they prove to be rotten dessert apples or good baking apples. Why should there be a warranty implied in this case if there is not also a warranty in favour of the buyer of a razor who, without looking at the article offered him, tells the vendor pointedly that the razor is to shave? The only way of avoiding this and kindred anomalies is to adopt the view of the Lord Chief Baron in the Divisional Court, and to read "particular purpose" as meaning any purpose made known by the buyer to the seller. Although this has the effect of making the word "particular" surplusage, statutes are scarcely more free from this defect than general

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literature, in which a loose or redundant use of this adjective is very common.

There can, I think, be no doubt that the present case comes within the terms of the sub-section thus construed. Miss Donovan's request for two nice fresh crabs, wanted by Mrs. Wallis for tea, followed by the selection of both the crabs by the shop assistant on his own judgment, notwithstanding her preference of another, proves that she made known the purpose for which the crabs were required in such a way as to convey to the seller that she was relying on him to make a suitable choice.

In stating my reasons for arriving at the foregoing conclusion, I have not thought it necessary to form an opinion as to what would have been the state of the law in a case like this previous to the passing of the Act of 1893. An examination of numerous authorities referred to during the argument has revealed no decision precisely in point, and it is difficult to extract a general rule from the *obiter dicta* of Judges directed to, or called forth by, the special facts before them. Little guidance is to be expected from an investigation that has led Palles, C.B., and Fitz Gibbon, L.J., to opposite conclusions. The value of a codifying statute consists in the removal of doubts and difficulties caused by the ambiguous and sometimes inconsistent utterances of Judges and comments of text-writers. Occasionally the draftsman of such an Act regards his duty as more mechanical than intellectual; but the Sale of Goods Act, 1893, is drawn clearly and carefully. It deserves praise for having swept away by unequivocal language all implied warranties or conditions as to the quality or fitness for any particular purpose of goods supplied under a contract of sale save as provided therein, or in some other statute. I have, therefore, tried to solve the questions in this action by the language of the sections that deal with conditions and warranties; and if I have fallen into error I fear that I should not have been saved therefrom by a fuller study of the antecedent law.

Solicitor for the plaintiff: *T. H. G. Wallis.*
Solicitors for the defendant: *J. C. & L. Blake.*

R. D. M.

THE KING (M'KAY) *v.* THE LOCAL GOVERNMENT BOARD FOR IRELAND (1).

Appeal.
1902.
June 4–6, 16.

Local Government (Ireland) Act, 1898, *sect.* 115—*Scheme for poor-rate collection—Existing officer—Poor-rate collector—Alteration of area and duties—Remuneration—Compensation.*

Sub-section 18 of section 115 of the Local Government (Ireland) Act, 1898, applies to the cases of county poor-rate collectors, and must be read together with sub-sections 11–15 and the other sub-sections of section 115.

Mandamus issued to the Local Government Board to take into consideration the claim of a poor-rate collector to increased remuneration in respect of an admitted increase in his duties, by reason of alterations under the Local Government (Ireland) Act, 1898.

ON the 5th October, 1888, John J. M'Kay had been appointed poor-rate collector for the electoral division of Cootehill, in the poor law union of Cootehill, and county of Cavan; he had been also deputy cess collector for the parishes of Drung and Laragh, in the barony of Tullygarvey, in the same county, and had continued to act as such poor-rate collector and deputy county cess collector down to and including the 1st April, 1899, when he expressed his willingness to serve under the Cavan County Council. The new urban district of Cootehill had formed portion of the area in which he had collected poor rate, but, on the passing of the Local Government Act, the Cootehill urban district council appointed a collector of their own, and the prosecutor ceased to collect in that area. As such collector he had been paid 10*d.* in the £ on his collection of poor rate, and 7*d.* in the £ on county cess, and he had been also in receipt of remuneration for work done as such collector in connection with the revision of the parliamentary and jurors' lists. In the scheme originally submitted to the Local Government Board the County Council of Cavan proposed to pay a poundage rate of 10*d.* to M'Kay, and

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

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the Board notified their approval of the scheme except as regards the rate of remuneration, whereupon the County Council submitted a proposal to pay all their collectors a uniform rate of 6*d.* in the £, and this scheme had been provisionally approved by the Local Government Board. M'Kay refused to accept this, as he alleged that his duties were considerably increased, while, at the proposed rate his remuneration would be less than that which he had theretofore received. Accordingly, he sent in a claim to the County Council for increased remuneration, but, on the 20th May, 1899, the County Council resolved not to entertain it. On the 23rd July, 1901, M'Kay's solicitor wrote to the secretary of the Local Government Board, asking whether the Board had approved of any scheme submitted by the Cavan County Council, under sect. 115, sub-sect. 10, of the Local Government Act, and received, in reply, a letter dated the 26th July, 1901, forwarding a copy of the Board's letter (of the 21st July, 1899) to the County Council, informally approving of the scheme, save so far as regarded the remuneration of M'Kay and another collector.

On the 1st August, 1901, M'Kay sent to the Local Government Board a claim (under sect. 115, sub-sect. 18) for increased remuneration in proportion to increased duties. The Board refused to entertain the claim on the ground that sub-sect. 18 of sect. 115 of the Local Government Act did not apply to poor-rate collectors. Pending the settlement of his claim M'Kay had accepted certain sums on account, but without prejudice to his claim.

In December, 1901, M'Kay applied to the King's Bench Division for a writ of *mandamus* directed to the Local Government Board, commanding them to "forthwith take into consideration, hear, and entertain the claim of the said John James M'Kay, an existing officer transferred to the Cavan County Council, pursuant to the said Local Government (Ireland) Act, 1898, to increased remuneration by reason of increased duties, and that you proceed to determine the increase of remuneration which the said John James M'Kay shall receive in proportion to the increase of his duties under and in consequence of the Local Government (Ireland) Act, 1898."

On the 11th February, 1902, the King's Bench gave judgment

in favor of M'Kay, and directed the writ to issue. (See the case reported *ante*, p. 330.)

On the 27th February, 1902, the Local Government Board made their return to the writ, in which they pleaded—

1. That M'Kay was not an existing officer transferred under the 115th section of the Local Government Act, 1898, who, since the coming into operation of the said Act, and subject to the provisions thereof, held his said office by the same tenure, and upon the same terms and conditions, as theretofore.

2. That M'Kay was not entitled to receive such increase of remuneration, in proportion to the increase of his duties, as the Board might determine, as M'Kay was an officer who has been employed under a scheme submitted to the Board by the County Council of Cavan, in pursuance of sect. 115, sub-sect. 10, of the Local Government Act, which scheme had been provisionally approved of by the Board.

3. That M'Kay was not a transferred existing officer to whom the provisions of sub-section 18 of sect. 115 of the Act apply, and that the Board was not bound by the Act to hear and determine the claim of M'Kay for increased remuneration in respect of his increased duties.

The plaintiff joined issue on the return, and also objected that the same was bad in law.

The case was tried before Wright, J., without a jury, on admissions of fact, on the 29th April, 1902, when his Lordship gave judgment for the plaintiff, and directed a peremptory *mandamus* to issue. The Local Government Board moved the King's Bench Division, that judgment should be entered for the defendants. On the 6th May, 1902, the King's Bench Division (Lord O'Brien, L.C.J., and Gibson, J.), following their previous decision, refused the application. From that decision the Local Government Board appealed.

Ronan, K.C., *Matheson, K.C.*, *Chambers, K.C.*, and *W. Gibson*, for the appellants:—

There are two sets of offices—(1) scheme offices and (2) non-scheme offices. M'Kay was only to be employed under a scheme, and the scheme must state what the officer's salary is to be. The

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duty of the County Council is to frame a scheme, which must be considered by the Local Government Board. The Board can modify the scheme as presented to them. The new duties the officer is to discharge are to be regulated by the scheme. The Board must see that the man gets substantially the same amount of pay for the same amount of work. Sub-sect. 16 must be read along with sub-sect. 10. Though the Board can modify the scheme in every way, they have no power to interfere with the pay. The approval of the scheme is a condition precedent to the right to the writ of *mandamus* asked for. The only duties the *mandamus* commanded us to perform were the duties under sub-section 18.

Fleming, K.C., and *Henry Maxwell* (with them *Healy, K.C.*), for the respondent:—

M'Kay holds office under the same tenure and at the same pay as before. The several sub-sections of sect. 115 must all be read together; sub-sections 15 and 18 cannot be read separately. Unless sub-sect. 18 applies to poor-rate collectors there is nothing to give them the same tenure under which they held. Save for the protection of that sub-section, they could be dismissed by the County Council without the approval of the Local Government Board. Approval of the scheme is not indispensable as a condition precedent: *Firth* v. *Staines* (1).

June 16.

LORD ASHBOURNE, C.:—

This case comes before us on appeal from an order of the King's Bench Division affirming the judgment of Mr. Justice Wright in the trial of the action, awarding a peremptory writ of *mandamus*, commanding the Local Government Board, pursuant to the provisions of the Local Government Act, 1898, to take into consideration, and hear and entertain, "the claim of John James M'Kay, an existing officer, transferred to the Cavan County Council, pursuant to the said Local Government Act, to increased remuneration by reason of increased duties, and to proceed to determine the increase of remuneration."

(1) 13 *Times'* Rep. 394.

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On the motion to make absolute the conditional order for a writ of *mandamus*, the King's Bench Division gave a considered judgment, pronounced by Mr. Justice Gibson, in favour of M'Kay and against the Local Government Board. The writ issued, the Local Government Board filed a return, the plaintiff filed a reply, and the trial took place before Mr. Justice Wright without a jury. The writ of *mandamus* stated *inter alia* "that by reason and in consequence of the said Local Government Act, and of certain things done by and in pursuance thereof, the duties of the plaintiff have been increased." In the return this allegation was not traversed, and no proof was therefore offered as to the fact of such increase. The Local Government Board in the return stated that the plaintiff was not entitled to receive the increase sought, as he had been employed under a scheme submitted to the Board by the County Council of Cavan, in pursuance of sect. 115, sub-sect. 10, of the said Act, and provisionally approved of by the Board. In his reply the plaintiff joined issue, and contended that the defences of the Board were bad in law, and the plaintiff relied "on the provisions of the Local Government Act, 1898, sect. 115." Having regard to the foregoing, and the admissions of fact, the trial occupied but a short time, and was really formal. Mr. Ronan, for the Board, asked the learned Judge to direct that the plaintiff was not an existing officer transferred under sect. 115 of the said Act, within the meaning of sub-sect. 18 of that section, or to whom the provisions of the said sub-section apply, and then to direct a verdict and enter judgment for the defendants. The learned Judge, having regard to the decision of the King's Bench Division in making absolute the conditional order for the *mandamus*, declined so to direct, and entered judgment for the plaintiff. The King's Bench Division supported this view, and hence this appeal by the Local Government Board.

The facts, although few and easily understood, are not quite as full and complete as they might be, and it is manifest that they could with advantage have been supplemented, and thus left less open to the possibility of technical objection. But on this point the plaintiff urges that whatever grounds of objection as to form exist should be attributed to the Local Government

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Board, and that if he is right in substance he should not be denied redress on grounds of form, for which the defendants alone are responsible. The plaintiff is certainly not responsible for the inchoate character of the scheme, or the provisional nature of the approval of the Local Government Board, or the delay which has taken place in putting the matter in a more formal and satisfactory position. He claims now that he is no longer in justice to be further delayed, and that the proceeding he has now taken is a legitimate means of trying to get his claim for increased pay for increased work taken into consideration and heard.

M'Kay was a poor-rate collector for an electoral division of the County Cavan, and a deputy cess collector for two parishes of the county. Being willing to serve new masters under the Local Government Act, he was included in a scheme framed by the County Council. He challenged the fairness of the remuneration fixed for him by the scheme, but the County Council rejected his claim. The scheme with this controversy was submitted to the Local Government Board, but they did not go into the matter so as to deal with it finally, or formally. They gave, moreover, an informal approval of the scheme, save so far as regarded the remuneration of M'Kay and another collector. The matter dragged on for two years, M'Kay meanwhile acting under protest, and receiving certain payments on account; and then M'Kay called on the Board to adjust the position and settle his remuneration, pursuant to sect. 115, sub-sect. 18. This the Board refused to do, on the ground that his case came within sub-section 11, and that sub-section 18 did not apply to the case of a county collector. The Local Government Board never suggested that his duties were not increased, or that the matter should await their final approval of the scheme. They denied *in toto* his right to increase of salary for increase of work, and insisted that under no circumstances did the plaintiff come within sub-section 18 of section 115 of the Local Government Act.

The contention of the Board is thus short and simple. They urge that the position of county collectors like the plaintiff is regulated by sub-sections 11 to 15 inclusive, and that it is not affected by sub-section 18, which only affects other existing officers.

Sub-section 10 provides that every County Council shall, within a time limited, submit to the Local Government Board a scheme, setting forth their arrangements for the collection of poor rate, and the officers they propose to employ for the purpose. Sub-section 11 enacts that "the scheme shall provide for the existing officers employed under the scheme, receiving remuneration substantially identical with that which they formerly received." The terms of sub-section 15 are as follows:—"The Local Government Board may approve any such scheme, with or without modifications, and all officers employed in pursuance of the scheme shall be deemed to be poor-rate collectors appointed by the County Council within the meaning of this Act." The Local Government Board contend that these sub-sections contain the whole code relating to county poor-rate collectors, that they are safeguarded in the receipt of a substantially identical income, that they are entitled to no more, even if their work is increased, and that sub-section 18 has no application whatever to the case of such officers.

I have formed the opinion that the County Council should, under sub-section 11, submit their scheme, with a substantially identical salary—*i.e.* substantially the same salary for the same amount of work, and that, under sub-section 15, the Local Government Board should see that modifications, when necessary, would be introduced so as to work out this result.

It might, however, well occur that public convenience would suggest that in some cases, as in M'Kay's case, the work should be increased. Could it have been intended that while the work was thus increased the pay was to stand still? that the pay was to be stereotyped while the work was enlarged?—thus making a sham identity of payment whilst work was increased and real identity was destroyed. And this, while sub-section 18 of the same section provides that when the duties of an officer were increased, he should receive such increase of remuneration in proportion to the increase of his duties as the Local Government Board might determine. But this is the argument of the Local Government Board, that while sub-section 18 applies to all existing officers transferred under the section, including urban poor-rate collectors, it does not apply to county poor-rate collectors,

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although existing officers transferred under the section, because they are included in a scheme contemplated by earlier sub-sections. It is also worthy of note that these county poor-rate collectors would appear to have no security of tenure, unless they are included in this sub-section 18. I cannot see any inconsistency between sub-sections 11 and 18. Sub-sections 11 and 15 may work perfectly acceptable results; but in case of difference of opinion in consequence of increase of duties, I see nothing to exclude the application of sub-section 18, which seems to have been framed and inserted in the section for the very purpose of meeting such cases. On the whole, I concur in the reasoning of the judgment of the King's Bench Division on this subject.

On the question of form I have had some difficulty and doubt, in consequence of the scheme not having been finally approved, or assumed a more formal shape; but I think it is right to regard the substance of the transaction.

The Local Government Board held the opinion that the plaintiff, as a county collector, is not entitled to any increase of pay for an admitted increase of work, and that he is excluded from the provisions of sub-section 18. The plaintiff does not at all suggest what increase of pay he may be entitled to. All he has sought, and all he obtains under the order of the King's Bench Division, is an order for the issue of a writ of *mandamus* in the form I have mentioned, and I am of opinion, under the circumstances, that he is entitled to retain that order.

I therefore think that the order of the King's Bench Division should be affirmed, and this appeal dismissed with costs.

FITZGIBBON, L. J.:—

We are called upon to decide this case upon what is, in effect, a demurrer to the defendants answer to the *mandamus* read in connection with the defendants "admission of facts." But it appears to me to be necessary, and to be within our duty and jurisdiction, to have the facts defined in one important particular. The answer paragraph 2 gives as a ground disentitling the relator to receive increase of remuneration in proportion to the increase of his duties, that he is an officer "who has been employed under a scheme submitted to the Local Government Board by the County

Council of Cavan, in pursuance of the Local Government Act (Ireland), 1898, sect. 115, sub-sect. 10, and which scheme has been provisionally approved of by the defendants."

No scheme could be submitted except in writing, and no approval could be given unless evidenced by a document.

"Feigned actions" no longer exist. "Craving oyer" was abolished by the Procedure Acts. Since *Armstrong* v. *Turquand* (1) every document relied upon in a pleading, when identified, is to be treated as incorporated therewith. We called for the scheme and for the provisional approval upon which the defendants relied in their answer, and the documents produced by the defendants in answer to this requisition are now marked by the Registrar, and are to be read with the answer in determining its validity in point of law. In my opinion, they are fatal to it.

The so-called "scheme," so far as M'Kay is concerned, merely names him as the "collector of poor-rate" over an area of which the valuation is given, and which does not correspond with the area of his collection before the Act; and it names a rate of poundage, 10*d.*, to which the so-called "provisional approval" shows that the County Council objected as excessive. The Local Government Board yielded to this objection for the time, and the approval is confined to so much of the scheme as does not relate to M'Kay or to another named collector. As to these two there is no approval at all, and the Local Government Board have objected to the proposed recasting of the area, but have stated the willingness of the Board to consider another rate of poundage not defined, if fixed by the council with due regard to sect. 115, sub-sect. 11. Nothing else is in evidence.

From these documents it is clear that we are called upon to decide the right of M'Kay before any scheme under which he could be employed has come into operation. It is further clear that the Local Government Board has not yet done anything effectual to give him his rights, whatever they are, and that for nearly three years the Board has been in default towards him, under either sub-sect. 10, or sub-sect. 18, or both. The answer admits that he was an officer existing at the passing of the Act, that his duties were increased by the Act, and that up to the

(1) 9 Ir. C. L. R. 32.

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present time he has performed those increased duties without any increase of pay. Under these circumstances, if he is entitled to such increase, either by a modification of a scheme under sub-sect. 10, or under sub-sect. 18, he has been deprived of it by the refusal of the Local Government Board to exercise its jurisdiction.

As the approval of a scheme is within the judicial discretion of the Board, and no scheme has been approved which provides M'Kay with "remuneration substantially identical with that which he formerly received," it must, in my opinion, follow that he is entitled to compel the Board to act under sub-sect. 18. In *Spencer's Case* (1), in giving the judgment of the Court, I stated that "it appeared clear that the Act of Parliament intended to provide that no person who previously held an office should, as a result of the passing of the Act, be left without either pay or compensation"; and again, that "the Act appeared to have determined that it would not cause loss of money by an existing officer ready and willing to do his old work for the old pay." A man whose work is substantially increased, while his pay remains the same, does not receive "substantially identical remuneration," for remuneration is the recompense for work, and whether pay is lessened or work is increased remuneration does not remain the same. If the Local Government Board had approved of a scheme which did not give M'Kay "substantially identical remuneration," such a scheme would not comply with the Act. But the substance of the answer is that M'Kay is now employed under such a scheme, and that, in approving of it, the Local Government Board is justified in refusing to consider any claim for increased pay for increased work. This being so, it appears to me to follow that if the contention of the Board is wrong, viz. that M'Kay, when employed under a scheme, must do more work for the same or less pay, that contention can afford no answer to the *substance* of his claim, whether put forward in the form of a *mandamus* to proceed under sub-sect. 18, or to modify the scheme so as to give him "substantially identical remuneration" under sub-sect. 11.

"Substantially identical," strictly speaking, is a contradiction in terms, for it must mean "somewhat different." But

(1) 35 I. L. T. R. 43; 1 Ir. Jur. (N. S.) 103.

assuming that it means that small differences may be ignored, the pleadings here are not confined to small differences. The contention is that increase of duties, no matter how great, can give no claim for increased pay to any officer employed under a scheme. The answer denies that any increase of pay whatever can be given to M'Kay, no matter how much his work has been increased, and the claim of the Local Government Board is that it has power to approve a scheme, and to make it binding upon an "existing officer," if the amount of his income under it is substantially the same as that which he received before the Act, regardless of the extent to which his work has been altered, in the direction either of increase or of diminution. Such a conclusion, in my opinion, would be equally unjust to the taxpayer and to the officer. I cannot hold that the Local Government Board can lawfully sanction a scheme which will either leave a formerly hard-worked officer to enjoy full pay with little or nothing to do, or which will impose upon an officer who previously got some small pay for very little work the obligation of discharging onerous duties for the same amount of money. I can find no escape from this result except by holding that sub-sect. 18 defines the duties of the Local Government Board towards all "existing officers," whether they are employed under schemes or not.

But even if I were wrong in this, it would still follow that an answer to a *mandamus* to proceed under sub-sect. 18, which relied upon the employment of the relator under a scheme, would be bad, unless it alleged that the scheme under which he was employed did give him "substantially identical remuneration," under sub-sect. 11; and this answer not only contains no such allegation, but it alleges that his increase of work gives him no claim for increase of pay. The answer, therefore, is *in substance* bad, even assuming that M'Kay's claim ought to be based on sub-sect. 11.

But I agree with the King's Bench that he is entitled to relief under sub-sect. 18. That sub-section cannot, in my mind, be interpreted without having regard to the sweeping provisions of the Local Government Act, 1888, sect. 120, incorporated in the Irish Act, schedule 7, which were in *Spencer's Case* (1) held "to

(1) 1 Ir. Jur. (N. S.) 293.

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make a net which will catch every case of an officer affected by the passing of the Act, and will give compensation to every existing officer who suffers pecuniary loss." No man can collect a larger amount of "poor rate" in the same area, nor collect the same amount over an extended area, without suffering some "pecuniary loss," if he gets no additional pay. The paramount object of the Act is to secure every "existing officer" against such loss. *Prima facie*, there ought to be no exception of any class of existing officers who suffer loss from the operation of sub-sect. 18. The words of that sub-section cover every "existing officer" —"If, by reason of any alteration of boundary, or other thing done by or in pursuance of this Act, his duties are increased or diminished, the officer shall be bound to perform those duties, and shall receive such increase or diminution of remuneration, in proportion to the increase or diminution of his duties, as the Local Government Board may determine, subject, nevertheless, in case of diminution, to such compensation as is provided by the Act." Sub-sect. 10 describes collectors as "existing officers transferred." Sub-sect. 18 directs that "every existing officer transferred under this section shall hold his office by the same tenure and upon the same terms and conditions as heretofore, and while performing the *same* or analogous duties shall receive not less remuneration than heretofore." There is no repugnance between this provision and sub-sect. 11, which appears to me to be a provision to the same effect, introduced to prescribe the manner in which the County Council, within six weeks after their first meeting, are to proceed in framing their scheme. If it be disobeyed, the Local Government Board must either provide substantially identical remuneration for the officer by apt modification of the scheme, or must disapprove the scheme and give him the relief to which he is entitled under sub-sect. 18. The power of modification under sub-sect. 15 is not confined to compliance with sub-sect. 11. It may be conveniently exercised so as to give the relief to either officer or taxpayer, which sub-sect. 18 makes it the duty of the Local Government Board to determine; but the contention of the defendants here is inconsistent with both sub-sections and with each sub-section, being a contention that though M'Kay was an existing officer transferred under the Act, and

as such entitled to increased pay for increased duties, he lost that right by being included in a scheme which is admitted upon the pleadings to have been framed upon the assumption that he was bound to do more work for the same pay, and it is further admitted that the Local Government Board has rejected his claim as being unfounded in law.

On this broad ground I should uphold the decision of the King's Bench, even if I held sub-sections 11 and 18 to be each exclusive of the other. But I do not so hold; and the judgments of Gibson, J., in this case, of the Lord Chief Baron in *Wray's Case* (1), and of my Lord Chancellor and Walker, L. J., render it unnecessary for me to give further reasons for my conclusion that the appeal should be dismissed with costs.

WALKER, L. J.:—

It is admitted that M'Kay was, at the date of the passing of the Local Government Act, a poor-rate collector for the electoral division of Cootehill, in the county of Cavan, and also deputy-cess collector for the parishes of Drung and Laragh in the same county.

It is not disputed that he was an existing officer, transferred by the Act to the County Council; and it is admitted that as such existing officer he was named in a scheme submitted by the Council to the Local Government Board, under sub-sect. 10 of sect. 115 of the Act, as an officer whom they proposed to employ. It is further stated that this scheme has been provisionally approved of; but as we have the scheme and so-called approval before us, we see they have not approved of the remuneration proposed by the scheme for M'Kay. If they entertain the opinion that he should get higher remuneration, they refuse to have the courage of their convictions. M'Kay has been doing for over two years the work prescribed for him by that scheme, and it is alleged in the writ, and not disputed, and therefore must be taken as admitted, "that by reason and in consequence of the Local Government Act, 1898, and of certain things done by and in pursuance thereof, his duties have been and are increased." He states that he required the Local Government Board to hear

(1) 2 Ir. Jur. (N. S.) 109.

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and determine, under the provisions of the Local Government Act, a claim made by him for increased remuneration in respect of his increased duties, and that they refused to hear and determine it. There is no doubt that he refers to the 18th sub-section of section 115 as creating the jurisdiction and obligation to give such hearing and make such determination, and states that since the Act, and subject to the provisions thereof, he held his office by the same tenure and upon the same terms and conditions as theretofore. The command sought is that the Local Government Board "do forthwith take into consideration." [The Lord Justice read the order, *ante*, p. 638.]

The case of the Local Government Board, in their return, is—"We are not" [here I use their words] "bound by the said Act to hear and determine the claim of the said J. J. M'Kay for increased remuneration in respect of his increased duties by reason of the said Act"; and they give two reasons—(1) he is not an existing officer transferred, who, since the Act passed, has held his office by the same tenure, and upon the same terms and conditions, as theretofore, and the 18th sub-section does not apply to him; and (2) he has been employed under a scheme submitted by the County Council, and which scheme has been provisionally approved by them; and so the case is left. This return raises questions of form and substance.

The Local Government Board contended that the 10th, 11th, and 15th sub-sections of sect. 115 form a complete code, dealing finally with the case and rights of county poor-rate collectors, and that sections 118 and 120 of the Local Government Act, 1898, do not apply to an existing officer named in a scheme, and we could not induce the counsel for the Board to say whether or not the Local Government Board could supply a remedy for the admitted injury under the powers of modifying the scheme given to them by sub-section 15. The contention was, sub-section 18 does not apply; this *mandamus* is based upon its assumed application; and therefore the *mandamus* must be refused.

In my opinion the contention is wrong in substance, and further, if it be necessary for doing justice, I think the real question raised should be treated as the right to have proper remuneration fixed by the Board; and if we consider that the Board is so

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bound, we should decide the real question upon the materials furnished by the pleadings, which are, I think, sufficient.

For the purpose of determining the application of the 18th sub-section, it is desirable to see what was the tenure of a poor-rate collector at the moment of his transfer to the new authority. At the time the Act passed every county poor-rate collector appointed by the guardians held office until he died, or resigned, or was removed by the Local Government Board. This was under the General Order, 1882. The guardians had power to suspend, but this could not ripen into dismissal unless, in effect, the Local Government Board sanctioned it; and he was also paid for the work he did by a remuneration fixed or approved by the Local Government Board, in practically all cases, by a poundage rate. That was his tenure. Sect. 83 of the Local Government Act provides, by sub-sect. 5, that the Local Government Board shall have the same powers as regards collectors of the poor-rate appointed by the County Council and their accounts as they would have if those collectors had continued to be appointed by the Guardians. Those powers were derived from the Act 1 & 2 Vict. c. 56. Then, sub-sect. 6 of sect. 83 enacts that, save as otherwise provided by this Act, the County Council may remove any of their officers. But sub-sect. 14 says:—"This section shall be without prejudice to the provisions of this Act respecting existing officers"—words which include poor-rate collectors. I may here mention that the Local Government Board, by General Order of 17th April, 1899, made under 1 & 2 Vict. c. 56, placed all poor-rate collectors, existing and new, on the same footing as before, viz. to hold till death, or resignation, or removal by them; but this subsequent act of the Board does not affect the argument.

It is admitted that M'Kay is an existing officer, who was transferred by the Act to the County Council, and accordingly he became one of a numerous favoured class for whom, under the title of existing officers, provision is made by sections 115–121. By sub-section 1 he becomes an officer of the council as if he had been appointed by that council; but this is subject to the provisions of the section which saves and defines his *status*.

It was quite necessary, having regard to the nature of the new poor-rate and its collection, and the retention of the Local Govern-

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ment Board's control, that some such provision as sub-section 10 should be found in that section. That provision is the framing of a scheme, setting forth the provisional arrangements for the collection of the poor-rate in its new form, the names of the collectors proposed to be employed, and (and this is in order to enable the Local Government Board to look after existing rights) the names of the existing officers transferred. The scheme cannot employ new officers if they have enough of existing ones; and if they leave out any of them, as they may, they must pay those existing ones left out, but in a different manner, according as they are willing to serve or hold pensionable offices, or non-pensionable ones. To this extent—viz. of getting money instead of office—the tenure of existing officers not employed under a scheme is largely affected; but it will be seen by reference to section 120 of the Local Government Act of 1898, that compensation for loss of office is assessed by reference mainly to tenure, and the existing officer is so far entitled to rely on it, though by the Act he is obliged to submit to loss of office. The two alternatives presented to him are office or money. Thus, the case of county poor-rate collectors not retained is finally dealt with.

The case, however, which we have immediately to deal with is the case of an existing officer retained in the scheme, and whose duties are by that scheme under the Act increased without, as M'Kay alleges, any increased remuneration; and, under sub-section 16, if the scheme doubles the area of work, he is bound to do the duties in the increased area.

The duty of the County Council is to lay before the Local Government Board a scheme which, in the case of existing officers, will provide for them "remuneration substantially identical with that which they formerly received." Both from the nature of things, and the words of the sub-sections, as the existing officer may find himself with the area for his work altered, and his work altered in fact, and duties increased or diminished, it may not be possible to make provision, or at all events just provision, to meet such cases, and therefore controlling power is given to the Local Government Board. Suppose the scheme fails in the objects desired to be attained, and it is admitted, in my opinion, that it does so here, there is a wrong. The remedy plainly must be

applied by the Local Government Board; but now we have what is called a scheme before us, and the views of the Board. They are asked to consider this claim; but they say, "We are not bound to consider his claim for increased remuneration for increased duties, because he is named in a scheme which we have before us, which, it is admitted, we may modify." Supposing in this case they proceeded to modify, what can they do, if M'Kay's admitted wrong is to be remedied, but give him, in the words of sub-section 18, "such increase or diminution of remuneration in proportion to the increase or diminution of his duties as the Local Government Board may determine"?

In the first place, the substance of what M'Kay asks is to get his claim for increased remuneration considered. It is true that with a view to invoking the authority of the Local Government Board he appeals to the 18th sub-section, but if he has a right to have done, in the way of modification of the scheme, exactly what the 18th sub-section says is to be done, I think he should get his rights, and that on the whole record he is entitled to get judgment in point of law.

But in my opinion sub-section 18 provides necessary machinery for enabling the Local Government Board to discharge their duty to the existing officer employed under the scheme submitted; and though the question is a difficult one, I think the judgment of Mr. Justice Gibson is correct, and that the Board is bound to apply that machinery. In the first place, without departing from the clear language of the sub-section, the rate-collector must be included in it. The words are, "every existing officer transferred under this section" (and it is admitted he fills that character just as clearly as other county officers) "shall hold his office by the same tenure, and upon the same terms and conditions, as heretofore, and while performing the same, or analogous duties, shall receive not less remuneration than heretofore." It is said how can those words apply to county poor-rate collectors, when under sub-section 11 a large proportion of them are deprived of all tenure, and are turned adrift with compensation or a gratuity. That is true, but it is done by the Act, and the right saved is subject to the provisions of the Act, and the question we have before us only refers to the existing officer who is retained. Why, if it does not

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apply to him, did not the sub-section say save poor-rate collectors mentioned in sub-sect. 11, or employed under a scheme, and unless the words "hold his office by the same tenure" apply to the existing poor-rate collector, he could be dismissed by the County Council within a month after the approval of the scheme, because he is put by the transfer in the same position as if he had been appointed by the Council. I have pointed out that the making of the General Order of 1899, which, in effect, renews his former tenure, does not affect this argument. The sub-section of course applies admittedly to numerous other officers, and in this case the legislation is necessary, and so are the words also, "and while performing the same or analogous duties shall receive not less remuneration than heretofore." This appears to me to be really as to poor-rate collectors saying over again what had been designed by sub-sect. 11 to be done in the way of instruction to the Council. Then comes the portion of the sub-section, without which, I think, the legislation is incomplete as to county poor-rate collectors. It will be remembered that sub-sect. 16 was admitted to apply to him, by which, if the area of duties was increased or diminished, he was bound to perform the duties in the enlarged area, and the sub-section proceeds: "And if by reason of any alteration of boundary or other thing done by or in pursuance of this Act his duties are increased or diminished, the officer," *i.e.* every existing officer transferred, "shall be bound to perform those duties, and shall receive such increase or diminution of remuneration in proportion to the increase or diminution of his duties as the Local Government Board may determine, subject, nevertheless, in case of diminution to such compensation as is provided by this Act," *i.e.* by sub-sect. 19, which admittedly has application to rate-collectors for the purpose of sub-sect. 12. The language of the 120th section referred to is important. It is of the largest kind, but no larger than sub-section 18. [The Lord Justice read the section.] Full justice can only be dealt out to rate-collector and County Council by making this part of the section applicable to his case. The urban collector would get an increase or suffer a diminution by reason of sub-section 18, and this section 120, and why should the county officer be in a different position from the urban one? The rights, if the contention of the Local Government Board is

correct, would depend on the accident of the authority to which he was transferred by the Local Government Board under sub-section 20, if a difference existed as to the Council to which the transfer should be made.

It may be possible that an existing officer might find himself transferred by reason of division of areas to both a county and urban authority, and what then is to happen? Why, alone of all existing transferred officers, should a county poor rate collector who by reason of what is done under the Act finds his duties increased, not be entitled to ask the Local Government Board to consider and determine whether he should not get proportionately increased remuneration? There is justice to the officer whose rights are intended to be preserved, just as it is fair to the County Council when he does less to give him lower remuneration, compensating him for the loss on the same scale as a collector gets under sub-section 12 when not employed.

I think that legislation is imperfect without the machinery provided by sub-section 18 being applicable to county poor-rate collectors. In the case of all other officers it is applied without reference to a scheme, because none in such case even provisionally exists, and the individual is dealt with. The scheme, so far as regards existing officers, names a number of individuals, each of whose cases on the theory on which the Act proceeds requires the same treatment in order to do justice to officer and Council.

It will be seen by reference to other cases that the question of the applicability of sub-section 18 to county poor-rate collectors has been considered by every Judge of the King's Bench Division except one, and all appear to have taken the view which I adopt.

In *Wray* v. *County Council of Antrim* (1) the applicant was collector of Coleraine Union, which extended into two counties—Londonderry and Antrim—and he was collector for electoral divisions in each. He expressed willingness to serve, and was retained in a scheme for the Londonderry part, at less remuneration, but was not retained in Antrim. He applied for

(1) 2 Ir. Jur. (N. S.) 109.

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a *mandamus* to the County Council to compensate him. It was held that sub-section 19 of section 115 applied to his case, and section 120 of the Local Government Act, 1888, under the words "every existing officer." Thus the question was discussed, whether sub-section 18 applied to him, and the Chief Baron says—"The argument on section 115, sub-section 18, is similar to that on section 120 of the Act of 1888. We are asked to control general words inserted to protect 'every officer' by excluding poor-rate collectors and officers for whom a scheme is to be made. A poor-rate collector who is an existing officer might be employed to perform increased duties, and his right to increased remuneration would depend on sub-section 18, and if I yielded to the contention that has been put forward, I would exclude a class from justice. It is said that sub-sections 11 and 18 are inconsistent, but is there anything inconsistent between the two sub-sections? Sub-section 11 applies to officers transferred who are to perform identical work—the duties and remuneration are to be the same. Sub-section 18 applies to another class where there is—(*a*) a transfer, and (*b*) a splitting up of jurisdiction, a part to one body and a part to another. It does not necessarily follow that the duties were identical with those the officer had to perform—splitting up would involve a possible alteration of duties, as there was in this case. This case is, therefore, within sub-section 18."

In *Campbell* v. *Mayo County Council*, a case of a poor-rate collector included in a scheme at a poundage which gave him less remuneration than he had before, the Local Government Board gave a conditional approval to that scheme, just as here. It was held that sub-sections 10 and 11 alone gave him no claims for compensation, and that it was necessary to supplement them by sub-section 18 and section 120 of the Act of 1888.

I adopt the language of Mr. Justice Gibson—"Sub-sections 11 and 15 are subordinate to sub-section 18, which is paramount and protects the tenure and remuneration of county collectors as well as all other existing officers. The scheme must as far as possible preserve the existing remuneration, but this benefit is not made illusory by the officers being deprived of the protection of sub-section 18."

In my opinion the appeal must be dismissed.

HOLMES, L.J. :—

Although I am of opinion that Mr. M'Kay, the relator, has suffered considerable injustice, I do not take quite the same view of his rights and of the construction of the 115th section of the Local Government (Ireland) Act, 1898, as that adopted by the Divisional Court.

I am of opinion that the 18th sub-section does not apply to rate collectors transferred to a County Council. My reason for coming to this conclusion is that the *status* and rights of these officers have been already exhaustively dealt with by sub-sections 10 to 16 inclusive.

Amongst the officers of the old authorities transferred to a County Council were those who had been engaged in the collection of poor rates and grand jury cess; and it was thought desirable to make special provisions relating to them. Accordingly, the County Council were directed within a limited time to frame a scheme setting forth the arrangements for the collection of the new poor rate, and the officers they proposed to employ for the purpose, and the names and descriptions of the existing officers transferred whom they proposed to employ under this scheme. The County Council were not obliged to continue in their employment all the transferred rate collectors. They might reduce their number, in which case provision is made for compensating, by pension or gratuity, those that were no longer needed. The scheme was to set forth the names of the retained collectors, the nature and extent of their duties, and the remuneration they were to receive. This last point is made clear by sub-section 11, which enacts that the scheme shall provide for the existing officers employed thereunder receiving remuneration substantially identical with that which they formerly received. This means that there is to appear in the scheme a definite statement of their future remuneration, or at least figures from which such remuneration can be calculated. The scheme so framed by the County Council was to be submitted to the Local Government Board, which by virtue of the 15th sub-section might introduce modifications into it. The scheme is thus the joint work of the County Council and the Local Government Board, and when completed in the prescribed manner, it contains a statement of the work each officer is to do and the

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remuneration he is to receive therefor. If this be so, I do not see any scope for the operation of the 18th sub-section in the case of the officers mentioned in the 10th sub-section, the nature of whose work and the amount of whose remuneration appear in the scheme. There is ample field for its application in the case of other transferred officers not dealt with by the 10th and following sub-sections.

I see no difficulty in understanding or carrying out the 11th sub-section. Its object is to secure that the retained officer will be in no worse position than he was before as to remuneration, which means payment for work done. A man's remuneration may be altered in one of two ways—either by increasing or diminishing his pay for the same work, or by increasing or diminishing his work for the same pay. I am of opinion that the intention and true construction of sub-section 11 are that the scheme is to provide that as far as possible the retained officer was to perform the same quantity of work and to receive the same payment as theretofore. In the case before us the County Council submitted three years ago a scheme under the 10th sub-section to the Local Government Board, which, while approving of its other provisions, objected to the portion of it that related to M'Kay and another collector. We are told by counsel for the Board that this objection was taken in the interests of the two collectors, inasmuch as the remuneration provided for them by the scheme did not comply with the requirement of the 11th sub-section.

If this were the case, the remedy was for the Local Government Board to modify the scheme, and had a modification been introduced so as to make M'Kay's work and remuneration substantially the same as they had previously been, he would have no ground of complaint. But this has not been done, and up to the present no scheme dealing with M'Kay's remuneration is in existence. At the end of two years his patience was exhausted, but I fear that the proceedings then taken by him were not well conceived. His right was to have a scheme framed pursuant to the statute. But the writ of *mandamus* issued and pleaded to was to command the Local Government Board to proceed under the 18th sub-section, which is in my opinion not applicable to his case.

The Divisional Court has held that he is an officer within the meaning of that section. Well, if he is, every rate collector transferred to a County Council would hold his office by the same tenure and on the same terms and conditions as theretofore. But this is quite inconsistent with the previous sub-sections, which show that the services of any rate collector so transferred may be dispensed with by the scheme, and that he could be obliged to accept compensation for his loss of tenure.

It is to be observed that the transfer of the rate-collectors is effected by the Act, not by the scheme, and the only way in which the 18th sub-section can be construed consistently with the previous provisions is to hold that the rate collectors transferred to a County Council are not within it.

I should be sorry to disturb any result which would relieve the relator from an undoubted grievance, and I am never disposed to yield to a technical objection. I gather from the argument that the substantial question in controversy is whether the work of the relator can be indefinitely increased without any increase of remuneration. The Local Government Board support the affirmative of this proposition; and agreeing with the other members of the Court that this is contrary to the provisions of the statute, I do not dissent from a judgment which will probably have the effect of relieving M'Kay from the injustice under which he has hitherto been suffering.

Solicitor for the relator: *Samuel Jones.*

Solicitors for the Local Government Board: *T. T. Mecredy & Son.*

R. D. M.

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GLASS *v.* PATTERSON (1).

(1901. No. 2866.)

Landlord and tenant—Rent—Assignment by tenant during currency of gale—Apportionment Act, 1870 (33 & 34 *Vict. c.* 35).

P. took an assignment, by way of mortgage from O'N., of lands held by O'N. as tenant to G., during the currency of a half-yearly gale of rent. G. claimed to be entitled to recover from P. the full amount of the half-year's rent falling due upon the next gale-day after the assignment:—

Held (Kenny, J., *dissentiente*), that the Apportionment Act, 1870, applies to the liability to pay as well as the right to receive, and that G. was entitled to recover from P. only an apportioned part of the rent, computed *de die in diem* from the date of the assignment to the gale-day.

Action to recover £28 2*s.* 1*d.*, being one year's rent up to Nov. 1, 1900, out of a holding in the townland of Ballykeel, Co. Down, held from the plaintiff, Mary Jane Glass, by Samuel O'Neill as judicial tenant. The rent was payable half-yearly, viz. on May 1 and Nov. 1. O'Neill, on February 19, 1900, and during the currency of the gale ending May 1, assigned his tenancy by way of mortgage to the defendant, William Patterson. The case was tried before Mr. Justice Madden without a jury on January 31st, 1902, whereupon it was contended on the part of the defendant that under the Apportionment Act, 1870 (33 & 34 Vict. c. 35), sect. 2, he, as assignee, was only liable to such apportioned part of the half-year's rent falling due on May 1 as had accrued since February, 19, 1900, the date of the assignment to him. Upon this contention the plaintiff's right to recover in the action would be reduced to a sum of £19 8*s.* 10*d.* The learned Judge, however, held that the Apportionment Act did not affect the liability of the assignee of a tenancy to pay the full rent accruing on the next gale-day after the assignment, and gave judgment for the amount claimed.

(1) Before Palles, C.B., and Johnson, and Kenny, JJ.

The defendant moved to have the verdict and judgment set aside upon the ground that the plaintiff was not entitled to recover a greater sum than one complete half gale of rent, and that portion only of the preceding gale between February 19, 1901, and May 1, 1901, making in all the sum of £19 8*s.* 10*d.*, and that as assignee of the tenant the defendant was not liable to any rent which accrued from day to day previous to the execution of the mortgage on February 19, 1901.

Hume, K.C. (with him *W. H. Brown*), for the defendant :—

The plaintiff is entitled to recover no more than £19 8*s.* 10*d.*, made up of so much of the May gale as is apportionable to the part of the half year subsequent to February 19, 1900, the date of the assignment, and the whole of the November gale. Section 2 of the Apportionment Act, 1870 (33 & 34 Vict. c. 35), applies. The preamble of that Act, which specifies that it was intended to make provision for the remedy of *all* the mischief and inconveniences contemplated, and the words of section 2, are sufficiently wide not only to affect the right to recover rent, but the liability to pay rent. The effect of the Act as between the tenant and his assignee was to treat rent as a liability arising from day to day, and to distribute that liability with regard to the time of the assignment. The general character of the words of section 2 was commented on by the Vice-Chancellor in *Rosengrave* v. *Burke* (1), which is a decision in favour of the defendant's contention.

The *Swansea Bank* v. *Thomas* (2) is directly in point. There the trustee for the lessee, who was a liquidating debtor, assigned over the lessee's interest in the lease during the currency of a quarter's rent. It was contended that liability for the full quarter's rent attached to the assignee, but it was held that the Apportionment Act applied, and that the lessor was entitled to recover from the trustee an apportioned part of the quarter's rent up the time of the assignment over by him. That decision was followed in the two bankruptcy cases of *In re Wilson* (3) and *In re Howell* (4).

(1) Ir. R. 7 Eq. 186.
(2) 4 Ex. D. 94.
(3) 62 L. J., Q. B. 628.
(4) [1895] 1 Q. B. 844.

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In the latter case Vaughan Williams, J., expressed the definite opinion that the Apportionment Act was intended not merely to affect the rights of the recipients of rent *inter se*, but also to apportion the liability to pay between the different occupiers of the premises during the currency of the quarter. In *Hartcup* v. *Bell* (1), which was a case at Nisi Prius, Manisty, J., followed the same ruling. To a like effect are the decisions in *Elvidge* v. *Meldon* (2); *The South Kensington Co-operative Stores* (3); *In re Leeks* (4); *Irwin* v. *Frazer* (5); and *In re Matthews* (6).

S. L. Brown, K.C., and *Brunskill*, for the plaintiff:—

The Apportionment Act does not apply as between landlord and tenant in the case of a continuing rent. There is no case which decides that a landlord cannot sue the assignee of a tenant for the whole of the half-year's rent. At common law rent was not in any case apportionable. This gave rise to two classes of mischief—one in the case of a continuing rent, and the other in the case of a rent which became extinguished between two gale-days. The mischief in the case of a continuing rent did not arise as between landlord and tenant, but only between persons entitled to successive interests in the landlord's estate. The mischief in the case of a rent which became extinguished between the two gale-days arose as between landlord and tenant. It was to remedy these mischiefs that the series of Apportionment Acts was passed. Prior to the passing of the Apportionment Act, as far as England was concerned, there was no remedy in the case of a continuing rent, except the rent was reserved by an instrument in writing, or in the case of a rent becoming extinguished between two gale-days otherwise than by death. It was to provide a remedy for *all* such mischief as still remained without remedy that the statute of 1870 was enacted, and we are entitled to look at the preamble of the Act, and say that it is only for that purpose that rent is "to be considered as accruing from day to day." This did not affect the common law of England, under which the landlord could

(1) 1 Cab. & El. 19.
(2) 24 L. R. Ir. 91.
(3) 17 Ch. D. 161.
(4) [1902] 2 I. R. 339.
(5) 10 L. R. Ir. 273, 280.
(6) 21 L. R. Ir. 507.

recover the entire gale from an assignee of the tenant, nor did it affect sections 14 and 15 of Deasy's Act, and it cannot affect the statutory condition under which the defendant holds these lands to pay the rent at the appointed time. The *Swansea Bank* v. *Thomas* (1), and the English cases which followed it, were wrongly decided, and are not binding on this Court. *Irwin* v. *Frazer* (2), *Elvidge* v. *Meldon* (3), *Leeks, a Bankrupt* (4), and *Matthews, a Bankrupt* (5) were referred to on the other side. None of these cases decides that the Apportionment Act, 1870, applies so as to alter the liability of the assignee of a tenant in the case of a continuing rent.

W. H. Brown, in reply.

May 17.

KENNY, J.:—

The verdict in this action was obtained by a landlord against the mortgagee of his tenant for the sum of £28 2*s.* 1*d.*, being two half-yearly gales of rent that became due on the 1st May, and 1st November, 1900, respectively. The tenant held under a judicial tenancy, and by deed of the 19th February, 1900, mortgaged by assignment to the defendant. The latter admits the plaintiff's right to the half year's rent that accrued due on the 1st November, 1900, and to an apportioned part of the preceding gale calculated from the date of the mortgage—when the tenant's estate vested in him—but disputes his liability for the antecedent part of that gale on the ground that the Apportionment Act of 1870, which deems a continuing rent as accruing from day to day, fixes the date of the mortgage to him as the date from which and after which rent could be regarded as due by him. The amount in dispute is thus reduced to a sum of about £8 9*s.*, representing the proportion of the May gale in respect of the period before the estate vested in the defendant, and the question is, whether the amount of the verdict should be reduced by that sum.

It is a somewhat singular circumstance to find this point only now for the first time raised in a definite shape in this country,

(1) 4 Ex. D. 94.
(2) 10 L. R. Ir. 273, 280.
(3) 24 L. R. Ir. 91.
(4) [1902] 2 I. R. 339.
(5) 21 L. R. Ir. 507.

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notwithstanding that the Apportionment Act of 1870 is thirty-two years in existence, and cases similar to, if not indeed identical with, the present must have arisen in the every-day relations between landlords and the assignees of tenants. I can account for the absence of authoritative decision only on the assumption that no one thought of questioning what was generally supposed to be the liability of the tenant's assignee, who became such assignee in the interval between two gales, for the *full* gale of rent that became due and payable while the estate was vested in him. If the Act does apply in the manner and to the extent contended for by the defendant, I can only say I am confident that not only has property been uniformly dealt with on a wholly different basis during these thirty-two years as between three sets of parties, namely—(1) landlords and their tenant's assignees; (2) successive owners of the tenant's interests; and (3) successive owners of the landlord's estate—but that the result of holding that there is an apportionment in such cases as the present will be to create mischiefs and inconveniences, instead of—in the words of the statute—removing them. In order to be satisfied as to the object and effect of the Act in its application to the present case, it will be necessary to shortly consider the position and legal liability of an assignee down to the passing of the Act—the general object and scope of the Act, and the true interpretation of the 2nd section which has been relied on as creating the very radical change which the defendant insists on.

There can be no doubt that, if the Apportionment Act were out of the case, the defendant, as assignee, would be liable for the entire amount of the gale in dispute, and not merely for a proportion. Independently of Deasy's Act he would have been so liable at common law by reason of the privity of estate. Had the tenancy been a leasehold created by deed, an express covenant on the tenant's part to pay the rent would—as it ran with the land—of course be binding on the assignee. If the deed contained no express covenant, the law would imply a covenant, the obligation under which would also be transferred to an assignee. The obligation in each case would arise by reason of the *privity of estate* attending the assignment. I apprehend that analogous liabilities arise in cases of tenancies from year to year, whether

created by a writing or by parol. Since Deasy's Act, the relation of landlord and tenant is to be deemed to be founded on contract —express or implied—and I take it that the baldest contract creating a yearly tenancy includes, as one of its terms, an agreement to pay the rent on the specified gale-days. If the tenant's interest be assigned, the obligation to pay the rent is transferred to the assignee by the mere assignment, and thenceforth he becomes personally liable to pay the rent by reason of the privity of estate, created between him and the landlord, and which has carried with it the liability on the tenant's contract as being a contract which ran with the land. I see no difference, as far as this common law liability is concerned, between tenancies created by deed or writing and a yearly tenancy resting in parol. If there be no distinction in this respect between them, the personal liability of the assignee admits of no doubt. The relations between landlord and assignee are pointed out with considerable force by the Court of Appeal in *Ex parte Dressler* (1) (a case decided eight years after the Apportionment Act), where trustees in bankruptcy where held to be personally liable for the *whole* gale of rent, and not a mere apportioned part. James, L.J., at p. 254, says:—"Here, if the trustees are liable, it is as assignees in possession of the land. The liability to the rent follows the possession," and again, at p. 256, when giving judgment he observes—"Under the old law if the assignee elected to take possession of the bankrupt's leasehold property, he became *by reason of his privity of estate* personally liable for the payment of the rent." Brett, L.J., is to the same effect, and Cotton, L.J., adds—"Sect. 35 (Bankruptcy Act, 1869) was relied upon to show that they are only liable for a part of the quarter's rent proportioned to the time during which they were in possession. But in my opinion that section simply gives to the landlord a right of proof which he would otherwise not have had; it in no way relieves the trustees from the personal liability which would have attached to them under the old law for the *whole* quarter's rent." To the same effect are the judgments of the Court of Appeal, four years later, in *Titterton* v. *Cooper* (2).

(1) 9 Ch. D. 252. (2) 9 Q. B. D. 473.

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Let us now see what recognition and extension the common law doctrine derived from Deasy's Act. The relation of landlord and tenant having by section 3 been declared to rest in contract, express or implied, section 2 defines "tenant" to mean "the person entitled to any lands under any lease or other contract of tenancy, whether the interest of such tenant shall have been acquired by original contract, lawful assignment, devise, bequest, or act, or operation of law." According to that definition, the moment the defendant became the assignee under his mortgage of the original tenant's estate in the tenancy, he himself became "tenant" for the purposes of that Act. If the original tenant was by his contract bound to pay his full gale of rent on certain gale-days, so was his successor in title, the assignee. This is made perfectly clear by the 14th and 15th sections of the Act, which declare that a tenant "being such by assignment" is to remain liable for the rent that shall have accrued due, not only up to the date when he himself transfers his estate to some third person, but up to and including the gale-day next following the service of notice of that assignment. The rent mentioned in these sections refers clearly to the full gales, not to broken or apportioned parts. Although the defendant here may not be a tenant entitled to have a fair rent fixed within the 57th section of the Land Law Act, 1881, because it does not appear that he is in the actual occupation of the lands comprised in the tenancy, yet he is none the less a tenant within the meaning of Deasy's Act, and bound by the terms of the original contract of tenancy other than that of the *amount* of the rent which is regulated by the fair rent order: *Bruce* v. *Steen* (1). So that whether by privity of estate, which in itself carries with it the liability for performance of the contract for payment of the rent, or by reason of Deasy's Act, the defendant here as "assignee" and "tenant" became liable for the *full* gale of rent in question, unless the Apportionment Act effected a complete alteration in this respect, both in the common law and in the statute.

Now, always bearing in mind that, before the Apportionment Act, the assignee was liable for the *full* gale, although his assignment may have been executed only the day before the latter was

(1) 14 L. R Ir at 426.

payable, is the effect of the Apportionment Act to make every day a gale-day so far as the assignee's liability is concerned, and to relieve him from liability in respect of the proportion of the gale of rent applicable to the period anterior to the assignment? In order to arrive at the true interpretation to be placed on the 2nd section, I think that we are justified in looking at the preamble of the Act in order to discover its purpose and see what are the mischiefs which were intended to be remedied by it. When the purpose and mischief are ascertained, the words in the enacting part ought to be confined to that which is the plain object and general intention of the Legislature (see judgment of Lord Tenterden in *Halton* v. *Cove* (1), adopted by Lord James in *Powell* v. *Kempton Park Racecourse Company* (2)), unless the enactment is in itself clear and unambiguous, (Lord Halsbury in the same case at p. 157.) If any doubt arises from the terms employed by the Legislature, it has, in the words of Tindal, C.J., "always been held a safe means of collecting the intention to call in aid the ground and cause of making the statute and to have recourse to the preamble, which . . . is a key to open the minds of the makers of the Act and the mischiefs which they are intended to redress"; *Sussex Peerage Case* (3), adopted by Lord Halsbury in *Commissioners of Income Tax* v. *Pemsel* (4). If the language of the enacting part be such that, without the help of the preamble, it is fairly capable of more than one meaning, the assistance of the preamble may be invoked in order to afford a key to its scope (Lord Davey in *Powell* v. *Kempton Park Company* (2)). In my judgment the second section of the Act now in question is not expressed in such clear and unambiguous language as to exclude the aid afforded by the preamble. The operative words of the section are, "considered as accruing," and it is obviously not clear whether, having regard to the 3rd and 4th sections of the Act, they mean "actual" accrual or what I may call "imputed" accrual — whether "accruing" is to be regarded as equivalent to "accruing due" or as having a more restricted meaning—whether the words apply to the payers of income as well as to the recipients; and, in the cases of rents, whether they are sufficient to effect a complete

(1) 1 B. & A. 538, at p. 558.
(2) [1899] A. C. at p. 185.
(3) 11 C. & F. at p. 143.
(4) [1891] A. C. at p. 543.

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alteration in some of the existing relations between landlord and tenant. If then we regard the preamble, we find it stated that legislation prior to 1870 had "remedied some of the *mischiefs* and inconveniences" arising from the fact that rents and other periodical payments were not at common law apportionable (like interest on money lent) in respect of time, and that it was expedient to make provision for the remedy of "*all* such mischiefs and inconveniences."

From this it would seem that the Act was intended to be limited in its scope to the remedying of such mischiefs and inconveniences of the common law as had been left untouched by previous legislation; and there is no suggestion that it was meant to have any wider range. The Act was the last of a series of statutes which created rights and liabilities that had not previously existed at common law, but there is no indication either in its preamble or, so far as I can gather, from its operative parts, that any previously existing right or liability was to be abridged or interfered with. The object of these Acts was, it would seem to me, to work out equities between successive owners of income, and at the most to give to such owners in certain cases direct remedies for the recovery of apportioned parts of gales. To effect these objects it was declared by the 2nd section that *all* rents, &c., were to be considered as accruing from day to day, and were to be apportionable in respect of time accordingly; but the 3rd and 4th sections made provision for the payers of *income* not being obliged to pay an apportioned part until the entire portion became "due and payable," and for payers of rent not being resorted to, save for such entire portion; and even then the person to recover directly from the payer was the person who if there had been no apportionment would have been entitled to the entire rent. These sections—the 3rd and 4th—in my opinion most effectually aid the preamble in qualifying the apparent generality of section 2 and in limiting its operation. If the payer of rent is not to be harassed by more than one landlord, or at any times other than those stipulated in his contract, what reason is there to suppose that the Legislature contemplated a disturbance of the hitherto existing contractual and statutory relations by reducing the assignee's liability for the entire amount of the gale to a

liability for a mere proportion of it. The former liability could not truly be said to be either a "mischief" or an "inconvenience" that needed a remedy, and there is the authority of Lord Selborne for not travelling outside the purpose of the Act. In *Jones* v. *Ogle* (1), decided in 1872, Lord Selborne says: "The real object of the statute was to obliterate technical distinctions between different kinds of fixed income recurring from time to time at stated periods, upon which, on account of their nature, those in *receipt* of income would rely for their maintenance and their ordinary arrangements in life. For one, I should be very sorry, and all the members of the Court would be sorry too, to put any narrow construction on that Act of Parliament which would tend to diminish its beneficial operation for the purpose evidently intended. But, on the other hand, it is not for us to put upon it any interpretation going beyond that purpose." As to what the purpose and scope of the Act are, Bowen, L.J., in *Parish* v. *Hudson* (2), decided in 1885, says: "I had doubts during the argument of the case, and I still doubt, whether the Apportionment Act altered the contract between landlord and tenant, and whether it made rent due from day to day in *every sense*. It is not necessary to decide this, and I do not desire to give a final opinion on the point." The purpose of the Act was also considered by the late Lord Justice Kay—then Mr. Justice Kay—in 1889, *In re the United Club and Hotel Company* (3). Dealing with the argument that the accrued rent became "due" from day to day, he makes the following observation:—"The Act most carefully abstains from anything of the kind. It was intended for a wholly different purpose, namely to divide, between the persons who, by reason of death or assignment or otherwise, became entitled to portions of accruing rent or interest, the amount of the accrued rent or interest when it becomes due. But the Act very carefully indeed points out that it does not mean to alter the due date in the least degree." If Kay, J., be right, no existing liability of a tenant is curtailed by the Act, and this view is supported in the latest text-book on the law of landlord and tenant—Mr. Foa's work. At pp. 116, 117 he makes this

(1) L. R. 8 Ch. App. at p. 196. (2) 55 L. J., Ch. 101.
(3) 60 L. T. (N. S.) 665.

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commentary on the Act—"Though its effect in certain cases is undoubtedly to impose a liability on the tenant where none existed before, it cannot upon its true construction take away an existing liability from the tenant or from a person who is by assignment in the position of a tenant." This conclusion exactly expresses the opinion I have formed of the true interpretation of the Act. That new liabilities are imposed on tenants and new rights are given to their landlords are illustrated by several of the cases cited in argument where broken gales were recovered under circumstances which, at common law, would have rendered them irrecoverable.

But there is no doubt that two English Judges (Vaughan Williams, J. (sitting in Bankruptcy), and Fry, J.) conceived a very strong opinion that the Act apportioned rents for all purposes. Their decisions were preceded by a case of the *Swansea Bank* v. *Thomas* (1), which is always cited for this general proposition. But the case requires to be carefully looked at. The plaintiffs claimed as against the defendant, who was a trustee for a liquidating debtor, an entire quarter's rent due on the 25th December, 1877, although the defendant had assigned away his estate on the 6th December, and thereby had bereft himself of all interest in the property before the gale-day. In argument the plaintiff abandoned his claim to the entire gale, and asked merely for the apportioned part up to the date of the assignment. The defendant based his defence on the ground that the assignee would be liable for the *whole* quarter's rent due on the 25th December; and all that the Court decided was that the plaintiff was entitled to an apportioned part up to the 6th December—that is, while the trustee remained in the position of assignee. But that case does not, nor does *In re Leeks* (2), decide that the plaintiff, as was contended for in argument, could not recover the whole amount from the assignee of the trustee, provided the former had the term vested in him on the gale-day. It is an authority for the proposition that a new liability was cast on the assignor, and a new right given to the landlord in respect of the apportioned part. The report of the case is remarkable in this, that the argument of the assignee's

(1) 4 Ex. D. 94. (2) [1902] 2 Ir. R. 339.

liability for the entire gale is not referred to in the meagre judgment of four lines; and the decision itself apparently did not altogether commend itself to the learned editor of the Reports, for he appends a query—whether the Act was intended to introduce any new law as between landlord and tenant or payer and recipient, or to do more than regulate further between themselves the rights of such recipients of income. In *Roseingrave* v. *Burke* (1) the Vice-Chancellor had already decided that the Act applied as between the devisee of a testator's real estate and his executors on the ground that for the purpose of apportionment it made each day's rent in the nature of an accrued and completed gale; but the case does not deal with rights other than those of recipients *inter se*. The construction of the Act was considered by Fry, J., in *In re the Silkstone Iron Company* (2) and *In re the South Kensington Co-operative Stores* (3). In the former he held that a landlord was entitled to be paid out of the assets the *full* gale of rent that accrued due after the commencement of the litigation. In the latter he decided that the right to payment in full extended only to the apportioned part calculated from the commencement of the liquidation, and, as a sort of tack to his judgment, he states the reason for the difference between the two decisions. I find it extremely difficult to appreciate his distinction, which is founded on the circumstance that in the former case the landlord had threatened to exercise a right of entry reserved to him in the lease. It was a threat which apparently the liquidator had treated with silent contempt by continuing on in possession of the premises just as the liquidator did in the second case. I may also add that the case of *Ex parte Dressler* (4), of which I have already made mention, and to which I shall again refer, was not cited in argument or in the judgment. In point of date, *Irwin* v. *Fraser* (5) came next; but I do not think it throws any light on the point we have to deal with. It was a question between successive owners of the rent. Neither do *Hartcup* v. *Bell* (6) nor *Elvidge* v. *Meldon* (7). In both cases the tenancy had actually *determined*

(1) I. R. 7 Eq. 186.
(2) 17 Ch. D. 158.
(3) *Ibid.* 161.
(4) 9 Ch. D. 252.
(5) 10 L. R. Ir. 273, 280.
(6) 1 Cab. & Ell. 19.
(7) 24 L. R. Ir. 91.

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between two gale-days, and it was only a question of liability for an apportioned part up to such determination. In *Parish* v. *Hudson* (1), Fry, L.J., differed from his colleagues, Lord Esher, and Bowen, L.J. The question was one of construction of a will where the testator bequeathed all rent and arrears of rent that might be due and owing at his decease. Fry, L.J., considered that the will should be construed with reference to the Apportionment Act, and that the bequest carried the apportioned part of the running gale. The Master of the Rolls and Bowen, L.J., construed the will without reference to the Act, and the case seems to be unimportant for our present purpose except for the general observations of Bowen, L.J., which I referred to in the earlier part of my judgment. The question came before Boyd, J., in this country in *In re Matthews* (2), and *In re Dressler* (3) was cited. The report of the case is most unsatisfactory, and I doubt if the short judgment is correctly given, inasmuch as it purports to be founded on *Re Dressler* (3), a case which was directly, as it seems to me, in favour of the motion which was refused.

Finally, I come to the decisions in Bankruptcy of Vaughan Williams, J., in *Ex parte Wilson* (4), and *Ex parte Howell* (5), where he held that the Act applied so as to not only affect the rights of recipients of the rent *inter se*, but also to apportion the liability to pay the rent as between the different occupiers during the currency of the gale. In both cases it was argued for the landlord that the assignee in whom the term would be vested when the gale became due and payable would be liable for the entire amount of the gale, and *Titterton* v. *Cooper* (6) was relied on. This latter case was sought to be distinguished on the ground that it rested on the existence of a covenant running with the land. No doubt the action in *Titterton* v. *Cooper* (6) was brought on the covenant; but in *In re Dressler* (3), which was the authority for *Titterton* v. *Cooper* (6), the word "covenant" does not appear from beginning to end of the report. The assignee was treated as liable for the full gale from the mere fact of being assignee,

(1) 55 L. J., Ch. 101.

(2) 21 L. R. Ir. 507; this report is accurate.—[ED.]

(3) 9 Ch. D. 252.

(4) 62 L. J., Q. B. 628.

(5) [1895] 1 Q. B. 844.

(6) 9 Q. B. D. 473.

which carried the contractual liability for the rent, with the estate. But notwithstanding these two decisions of *Re Wilson* and *Re Howell*, I cannot accept them as express authorities for the non-liability of the assignee for the entire gale. If they can be held to amount to that, then it seems to me they are directly opposed to the decisions in *Ex parte Dressler* (1) and *Titterton* v. *Cooper* (2), both cases in the Court of Appeal. In the former the trustee in bankruptcy whose title had accrued during the running gale was held to be personally liable for the whole gale on the simple ground of privity of estate. In the latter the trustee was held not to be liable for a gale that was payable before his title accrued, but, like *Ex parte Dressler* (1), personally liable for the whole of the running gale. Cotton, L.J., bases his liability on the ground of the privity of estate, inasmuch as the Bankruptcy Act put him in the position of an ordinary assignee. No doubt the Apportionment Act is not referred to in either of these cases, but I cannot think for a moment that its existence was forgotten or overlooked.

Looking at the cases which I have thus glanced at, it seems to me that we are not precluded from forming our own judgment by those relied on as being in favour of the defendant. None of them decide the exact point that is raised in the present case. On the other hand, I cannot avoid the conclusion that *Ex parte Dressler* (1) and *Titterton* v. *Cooper* (2) are express authorities that we ought to follow, even if we thought it was open to us to differ from them. So far as I am concerned, I respectfully concur in those decisions.

I therefore think that the Apportionment Act has no application in the present case, and that the judgment of my brother Madden, who tried this action without a jury, was correct, and that the plaintiff is entitled to hold his verdict for the full amount.

JOHNSON, J.:—

As this case was dealt with at the trial and in the argument in this Court, the facts are in a narrow compass. The plaintiff, Glass, is the landlord of O'Neill, a judicial tenant in possession of an agricultural holding at a yearly rent of £28 2*s.* 1*d.*, payable by

(1) 9 Ch. D. 252. (2) 9 Q. B. D. 473.

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two equal half-yearly gales, 1st May and 1st November. On the 19th February, 1900, during the currency of the gale of rent ending 1st May, 1900, O'Neill assigned his holding by deed to the defendant Patterson by way of mortgage. Glass, the landlord, had notice of this assignment; O'Neill continued in possession; Patterson never entered into, nor was in, possession of the holding. In this state of things Glass, the landlord, in March, 1901, instituted the present action of debt for one year's rent (composed of the two gales, 1st May and 1st November, 1900) against Patterson. After the issue of the writ in this action, O'Neill, the tenant, made up the whole year's rent for which Patterson was sued, and offered to pay it to the landlord's agent, who refused to receive it because O'Neill did not also offer to pay £2 10*s*., the cost of the writ against Patterson. The action proceeded to trial, and Glass, the landlord, had judgment against Patterson for the whole year's rent sued for. The contention for Patterson, the assignee of the tenant, is that by the Apportionment Act, 1870, he is not liable for so much of the gale of rent ending 1st May, 1900, as accrued prior to the assignment to him, 19th February, 1900. The contention for Glass, the landlord (as I understand it), is that the Apportionment Act, 1870, does not in Ireland apply to rent payable by the tenant or tenant's assignee to the landlord; but this contention appears to me inconsistent with the construction which the Act has already received in Ireland: *Roseingrave* v. *Burke* (1); *In re Leeks* (2); and by which I think this Court is bound. Assuming, however, that it is still an open question, I think, even apart from authority, that the construction of the Act of 1870 is reasonably plain and clear. By the common law rent under a contract of tenancy payable at specified periods accrued due as a debt only at the date when the rent became payable; it was a contract one and indivisible, and a current gale of rent was not apportionable in respect of time between landlord and tenant. On the other hand, interest, on a contract for money lent at interest, accrued due from day to day, although it might be payable on certain specified days, and was apportionable in respect of time between the debtor and the creditor. By the Landlord and

(1) I. R. 7 Eq. 186, V.-C. (2) [1902] 2 I. R. 339, C. A.

Tenant Act (Ireland), 1860 (23 & 24 Vict. c. 154), sect. 14, the assignee of a tenant is only liable to the landlord in respect of such rent "as shall have" accrued due subsequent to such assignment, and while he shall continue such assignee. In this state of the law the Apportionment Act, 1870, was passed, and recites in the preamble that "rents and *some* other periodical payments are not at common law apportionable (like interest on money lent) in respect of time, and for remedy of *some* of the mischiefs and inconveniences thereby arising divers statutes have been passed"—mentioning the 11 Geo. 2 (Eng.), c. 19, from the 15th section of which the 23 & 24 Geo. 3, c. 46 (Ireland), appears to have been taken; the Apportionment Act of 1834; the English Tithe Commutation Act of 1836; the Emblement Act of 1851, and the Landlord and Tenant Act (Ir.), 1860—and proceeds: "And whereas it is expedient to make provision for the remedy of *all* such mischiefs and inconveniences: be it therefore enacted as follows." Language could hardly be plainer: it may be summarised—(*a*) rent was not at common law apportionable in respect of time like interest for money lent at interest; (*b*) mischief and inconvenience arose from this condition of things; (*c*) for remedy of *some* of these mischiefs and inconveniences divers statutes had been passed; and (*d*) now the time had come when it was expedient to provide a universal remedy for *all* such mischiefs and inconveniences. By this statute, applicable to the whole United Kingdom, section 2 accordingly enacts that "*all* rents . . . whether payable under an instrument in writing or otherwise" (and so bringing in parol tenancies), "shall, like interest on money lent, be considered" (that is treated and dealt with) "as accruing from day to day, and shall be apportionable in respect of time accordingly." I am not able to construe this affirmative enactment for all parts of the United Kingdom as an enactment governing all rents except in Ireland, or as applicable only to the landlord or payee of rent and not to the tenant or payer of rent. In my opinion, therefore, in the present case, on the plain construction of the Act of 1870, the half-yearly gale of rent from 1st November, 1899, to 1st May, 1900, is to be treated for the purpose of apportionment in respect of time between Glass the landlord and O'Neill the tenant, and Patterson the assignee of the

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tenant, as having accrued due day by day up to the assignment by O'Neill to Patterson on the 19th February, 1900; and then, by the Landlord and Tenant Act (Ireland), 1860, s. 14, Patterson the assignee is, by privity of estate, liable to Glass the landlord in respect of such rent as shall have accrued due subsequent to such assignment, without, however, relieving O'Neill from his contractual and statutable obligation as a judicial tenant to pay the entire May gale to his landlord, except that so far as the landlord recovers the apportioned part from Patterson, he cannot recover the same apportioned part over again from O'Neill—he cannot have the same part of the same rent twice over. Sections 3 and 4 of the Act of 1870 preclude the landlord from recovering the apportioned part of the current half-yearly gale from the person liable to pay it until the entire half-yearly gale is payable. Besides the authorities in this country which I have mentioned, and by which in my opinion this Court is bound, this is the construction of the Act of 1870, adopted in *Hasluck* v. *Pedley* (1), *The Swansea Bank* v. *Thomas* (2), *The South Kensington Stores* (3), *Re Wilson* (4), and *Re Howell* (5). The judgment of Fry, J., in the *South Kensington Stores* (3) is as applicable to the tenant and landlord and the payer and the receiver of rent in Ireland as England. At page 165 he says: "Now how did the law stand before this Act" (the Act of 1870) "was passed? Plainly in this way, that rent neither accrued due nor was payable except on the day on which it was reserved; whereas, interest on money lent accrued due *de die in diem*, although it might be payable at certain specified days. The effect of the section" (sect. 2 of the Act of 1870) "is to declare that rent, like interest, accrues due from day to day, and that the payment of rent like payments of interest when they are periodical shall be apportioned in respect of the time at which the rent like the interest accrued due." As to the consequences of this decision, the Legislature has by the Act of 1870 definitely altered, as Fry, J., says (6), "the law of England," and in my opinion the law of Ireland also. Two authorities which were relied

(1) L. R. 19 Eq. 271.
(2) 4 Ex. D. 94.
(3) 17 Ch. D. 161.
(4) 62 L. J., Q. B. 628.
(5) [1895] 1 Q. B. 844.
(6) *Re Lucas; Parish* v. *Hudson*, 55 L. J. Ch. 101.

on for the plaintiff do not appear to me to apply to the case in hand. *Re Sneezeem, Ex parte Davis* (1) was a case in which a bankrupt had entered on an executory contract to maintain and repair railway waggons for seven years. The trustees of the bankrupt took over the contract, performed it for some time and finding it unprofitable threw it up, and it was held that the remedy of the other party to the contract was to prove in the bankruptcy for the breach. *Ex parte Dressler, In re Solomon* (2) was a case in which a trustee in bankruptcy during the currency of a quarter's rent took actual possession of the bankrupt's leasehold, and did not disclaim when called on by the landlord to do so, and remained in possession until the quarter's rent expired; and the decision appears to have turned on the fact that the trustee in bankruptcy, having taken actual possession and kept it, was, under the English Bankrupt Act, in the same position as the bankrupt tenant himself had been.

For these reasons, I think Patterson the defendant is not liable to the plaintiff for the apportioned part of the gale ending 1st May, 1900, prior to the assignment to him, 19th February, 1900.

If the defendant had paid into Court in this action the rent sued for, less the apportioned part, he would, in my opinion, have succeeded in defending the action; but as he has not taken that course, nor paid this rent, the judgment against him must stand for the reduced sum.

PALLES, C.B. :—

I agree with Mr. Justice Johnson that the defendant is liable to no more than an apportioned part of the gale of rent current at the time of the assignment to him. This limitation of liability appears to me to be involved in the decision in *The Swansea Bank* v. *Thomas* (3), because, although the question there was as to the liability of the assignor of the lease, that liability depended upon the apportioned part of the rent up to the date of the assignment having "accrued *due*" prior to the assignment. The decision that it had so accrued due is inconsistent with the entire gale accruing due on the subsequent gale-day.

(1) 3 Ch. D. 463. (2 9 Ch. D. 252. (3) 4 Ex. D. 94.

This decision was pronounced upwards of twenty-two years ago. Not only has it never been overruled, but it never has been expressly questioned, nor has the principle it established been doubted in any case in which it was cited. It has been followed by Lord Justice Vaughan Williams in *Wilson's Case* (1) in 1893, and in *Re Howell* (2) in 1895; and in 1881 Lord Justice Fry arrived, apparently independently, at the same conclusion in *The South Kensington Co-operative Association Case* (3), in which *The Swansea Bank* v. *Thomas* (4) was not cited.

The decisions in *Ex parte Dressler* (5), and *Titterton* v. *Cooper* (6), and the *dicta* of Lord Justice Bowen in *In re Lucas; Parish* v. *Hudson* (7), of Lord Justice Kay in *The United Club Company* (*Limited*) (8), and of Lord Justice Fry himself in *The Silkstone and Dodworth Coal and Iron Company* (9) are relied on as contrary to this principle.

The first of these cases, *Ex parte Dressler* (5), is a decision, not on the Apportionment Act, but on the Bankruptcy Act of 1869. The strongest of the observations relied on is that of Lord Justice Cotton. He says that section 35 of the Bankruptcy Act "in no way relieves the trustees from the personal liability which would have attached to them under the old law," *i.e.* the law before the the Act of 1869, "for the whole quarter's rent." This cannot be treated even as a *dictum* as to, much less as a decision upon, the construction of the Act of 1870. In truth, in that case the Act of 1870 was entirely overlooked by counsel and the Lords Justices. Similar observations apply to the statements of the other Lords Justices there, and to the decision in *Titterton* v. *Cooper* (6).

The question in *In re Lucas* (7) was the meaning, in a clause of a will, of the words "arrears of rent"; and it was determined upon considerations foreign to the construction of the Apportionment Act. The words used by Lord Justice Bowen, "Does it refer to more than recipients?" do not indicate any concluded

(1) 62 L. J., Q. B. 628.
(2) [1895] 1 Q. B. 844.
(3) 17 Ch. D. 161.
(4) 4 Ex. D. 94.
(5) 9 Ch. D. 252.
(6) L. R. 9 Q. B. 473.
(7) 55 L. J. Ch. 101.
(8) 60 L. T. (N. S.) 665.
(9) 17 Ch. D. 158.

opinion. Had they done so, their effect upon my mind might have been different. The respect with which all who value scientific law regard that most eminent Judge invests every expression of his, even when unnecessary to the decision, with much authority.

The decision of Lord Justice Kay in *The United Club Company (Limited)* (1) was that a portion of a gale of rent, which had not become payable by reason of the gale day not having arrived, was not a debt then payable so as to sustain an application for a winding-up order. This conclusion necessarily followed from the 3rd section of the Act 33 & 34 Vict. c. 35. As to the passage from his judgment which is relied upon, it is to be observed that the alleged apportionment there in question was that of the right to receive, not of the liability to pay; and *quoad* this, it is true that the Act was intended, in the words of Lord Justice Kay, "to divide between the persons who, by reason of death or assignment, or otherwise, become entitled to portions of accruing rent or interest, the amount of the accrued rent or interest, *when it becomes payable.*" In other words, the element in the argument of counsel which the learned Judge there disaffirmed was that as to the time of payment.

In *The Silkstone and Dodworth Coal and Iron Company* (2) Lord Justice Fry expressly declined to determine whether there should be an apportionment of the rent. He based his decision on the ground that the lessors were entitled to enter and stop the working of the mine unless the entire gale of rent was paid; and he held, in my opinion undoubtedly rightly, that as the liquidator elected, after notice, to continue the working, he was bound to satisfy the conditions on which alone he could lawfully do so. That case would have been in point if the present action had been one of ejectment, and had the question been the right to redeem without payment of the rent due antecedently to the assignment.

In result, then, I am of opinion that none of the cases cited for the plaintiff is really in point here.

But the matter does not rest there; because, as I read the

(1) 60 L. T. (N. S.) 665. (2) 17 Ch. D. 158.

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decision in *In re Leeks* (1), our Court of Appeal has affirmed the same principle. As, if this is so, it is not open to us to consider the question in this Court, it is necessary to refer to that case with somewhat more of detail than I have thought necessary in reference to the English authorities, which, although we treat them with the utmost respect, are not absolutely binding on us.

The question in *In re Leeks* (1) arose upon a disclaimer by assignees in bankruptcy of the bankrupt's interest in a lease; and it was whether, under such circumstances, the lessor was entitled to prove for an apportioned part of the rent which accrued due between the last gale-day and the date of the adjudication. If this apportioned part had been admitted to have been "*debitum in praesenti*," the circumstance that it was payable *in futuro* would not, under the Bankruptcy Act, have affected its provability; and consequently the argument for the assignees was rested upon cases such as *Hoskins* v. *Duperoy* (2) and *Hopkins* v. *Thomas* (3), with the view of showing that, at the time of the adjudication, the rent from the immediately preceding gale-day did not constitute a present debt. The Court decided in favour of the lessor; and each of the three learned Judges expressly based his decision upon *inter alia* the Apportionment Act, 1870.

Fitz Gibbon, L.J, says:—"But the Apportionment Act is equally conclusive. It is simply an extension of the Bankruptcy Act, 1869, section 35. The only difference is the *condition* of the *simile*, "like interest on money lent." Interest on money lent—on bills, notes, and all other interest-bearing debts—is admittedly apportionable and provable in bankruptcy, up to the date of the adjudication, and it is so because it '*accrues* from day to day.' Rent must follow the same rule . . . under the Apportionment Act."

Walker, L.J., says:—"Again, under the Apportionment Act, 1870, the rent is to be considered as accruing from day to day"; and Holmes, L.J., adds:—"I concur, and I am ready to decide the case on either ground."

This decision establishes two things:—(1). That the Apportionment Act applies to the liability to pay, as well as to the right to receive, and shows that the question asked by Bowen, L.J., in

(1) [1902] 2 I. R. 339. (2) 9 East, 498. (3) 7 C. B. (N. S.) 711.

In re Lucas; Parish v. *Hudson* (1), must be answered in the affirmative. (2). It establishes, if indeed authority were required for it, that the word "accruing" in the 2nd section of the Act means "accruing *due*"; and that therefore rent must now be considered as accruing due from day to day; that a gale of rent, instead of being, as it was before the Act, one entire thing, is an aggregate of many distinct things.

Let me now apply these principles to the case before us. The liability of the defendant here does not arise from any contract between him and the plaintiff. There is no such contract. Such liability as he is under is an incident which our law attaches to his having accepted an assignment of a thing held by his assignor under a contract with the plaintiff; and therefore the question is, what liability is by law incident to the defendant's acceptance of such an assignment? Without entering upon any refinement as to whether covenants running with the land were known to the common law, it is sufficient to say that it is certain that the common law has no application to the case before us; and that whatever liability the defendant is under depends upon the 23rd & 24th Vict. c. 154. But the 14th section of that Act limits the liability of an assignee to "such rent as shall have *accrued due* subsequent to such assignment."

The decision, therefore, in *Leeks' Case* (2) that rent is to be considered to have accrued due *de die in diem*, establishes that, in a case such as the present, the only portion of the gale of rent current at the time of the assignment to which the defendant is liable is the apportioned part of it in respect of the time. In that respect I hold that this case is conclusively ruled by *Leeks' Case* (2).

As, however, unhappily, the Court is not unanimous, it may not be out of place for me to state that I should have undoubtedly arrived at the same conclusion even if we had not the assistance of *Leeks' Case* (2). I must express myself, with great deference to my brother Kenny, wholly unable to follow the reasoning which reads the statute, general and unlimited as are its terms, as one enacted solely in the interest of landlords, or of other

(1) 55 L. J. Ch. 101. (2) [1902] 2 I. R. 339.

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recipients of such periodical payments as were theretofore unapportionable. The mischiefs and inconveniences mentioned in the preamble to the statute, and intended to be thereby remedied, were those arising from "rents and some other periodical payments" not being "at common law apportionable, like interest on money lent, in respect of time." The statute tells us that for remedy of some of these mischiefs and inconveniences certain enumerated statutes had been passed, and "that it is expedient to make provision for the remedy of *all* such mischiefs and inconveniences." Those mischiefs and inconveniences necessarily have been of two classes, according as the act, which rendered the apportionment just or expedient, affected the rights (1) of the persons entitled to receive, or (2) of the persons liable to pay.

Of the first class, a typical example was that of a tenant for life, with remainder over, of land demised at a rent by a lease which bound both the tenancy for life and the remainder. If the tenant for life died upon the day before the gale-day, the gale, of which practically the entire was in respect of the tenancy for life, was receivable by the remainderman, to the exclusion of the tenant for life. This, undoubtedly, was one of the mischiefs intended to be remedied, and which was remedied, by the Act.

Of the second class, a typical example was that of a tenant for life demising by a lease which did not affect the remainder, and which consequently expired upon his death. In such a case neither tenant for life nor remainderman was entitled to any part of the rent for the current gale, so that the tenant was not under any liability to pay for his occupation during the period between the previous gale-day and the death of the tenant for life.

The clearest evidence that the mischiefs of both of these two classes were within the purview of the Legislature is to be found in the Acts referred to in the preamble. The remedy provided for them was both general and radical, and this remedy involved the creation of new rights and new liabilities. It altered rights and liabilities, even those under existing instruments. In the expressive language of Lord Justice Fry, it altered the law of England; and, if it did so, it also altered the law of Ireland; and our province is no more than to ascertain the extent of that alteration.

Now, are there no other anomalies which arose from the non-apportionable characteristic of rents at common law, which *may have been*—I do not say they actually were—considered by the Legislature mischiefs or inconveniences? In the second class to which I have referred, there was a characteristic which may have been considered an injustice to tenants. Just as a tenant in remainder, who became entitled upon the day preceding a gale-day to the entire gale of rent, to the exclusion of his predecessor, so, too, the assignee of a lease whose title accrued on the same day, next preceding a gale-day, became liable to pay the entire of the gale. Were it my duty to inquire whether such a characteristic was within the mischiefs intended to be remedied, I would be obliged to say that I cannot find anything either in the words of the statute itself, or in the Acts referred to in its preamble, which indicates an intention of the Legislature to use those general words in any such restricted sense, or for any such restricted purpose, as would justify me in excluding from them a case which, *prima facie* at least, is clearly within them.

But the enacting words of the statute preclude any such inquiry. The scheme of the legislation is this:—Mischiefs, still unremedied, exist by reason of the non-apportionable character of rent at common law. We, the Legislature, for remedy thereof will extinguish that non-apportionable character altogether. This it does by clear and unambiguous words. Thus every incident resulting from that character has ceased to exist, whether the Legislature may or may not have actually had such particular incident within its contemplation.

In my opinion, the amount of the verdict should be reduced to that of the apportioned part.

Solicitor for the plaintiff: *James Derby.*
Solicitor for the defendant: *Joseph Lockhart.*

J. L.

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In re GREY, Infants (1).

April 2, 9, 30. May 16. Habeas corpus—*Custody of infants—Guardianship of Infants Act*, 1886—*Rights of a mother, who, after her husband's death, has changed her religion, to the custody of the infant children of the marriage.*

G., a Protestant, died intestate in 1900. Upon his death his widow, being in impoverished circumstances, entrusted the three infant daughters of the marriage to a Protestant orphanage. In November, 1901, she remarried with C., a Roman Catholic, and became a member of his Church. It was admitted that if handed over to her the three infants (aged fifteen, seven, and four years) would be educated as Catholics. C.'s means consisted only of a small farm of some 14 acres:—

Held, that, under all the circumstances of the case, the mother's application on *habeas corpus* for a transfer to her of the custody of the infants must be refused.

Habeas Corpus. This was an application on behalf of Charlotte Callan (otherwise Grey), the mother of the infants, Isabella, Emily, and Julia Grey, to make absolute notwithstanding cause shown a conditional order, dated 28th February, 1902, for a writ of *habeas corpus ad subjiciendum* directed to Mr. Bindon Scott, honorary secretary of the Protestant Female Orphanage, Harold's Cross, Dublin, and Miss Sophia Bailey, the matron of that orphanage, with a view to have the custody of the infants transferred to the applicant. Charlotte Callan was in November, 1886, married to Henry Grey. He died intestate in 1900. There were six children of this marriage, viz.: three daughters (the infants above-mentioned), now aged fifteen and seven and four years, and three sons. Shortly after her husband's death the applicant, being unable to provide for the girls, placed them, in July, 1900, at the Protestant Female Orphanage, Harold's Cross, and gave a written undertaking not in any way to interfere with said children nor to seek to remove them from the orphanage. In November, 1901, the applicant was married to Christopher Callan, a small farmer in

(1) Before Lord O'Brien, L.C.J., and Andrews and Gibson, JJ.

county Kildare, and in January, 1902, being (as she stated) in a position to provide for her three daughters, she had applied to the orphanage for their return to her. Mr. Bindon Scott, the secretary of the orphanage, had declined to do so unless so directed by the order of a competent Court. In a letter, dated 22nd January, 1902, he wrote:—"You yourself placed them in the orphanage, and undertook not to seek in any way to interfere with or seek to change them from it; you had been and then were a Protestant, but as you have since thought fit to marry a Roman Catholic and to change your religion for his, I am justified in concluding that your only object in trying to withdraw the children from the orphanage, which is at present their proper custodian, is to have them also changed into Roman Catholics, a thing their father would never have wished or permitted." The lady superintendent, Miss Sophia Bailey, had also declined to hand over the children. Upon her marriage with Christopher Callan, who was a Roman Catholic, the applicant had been received into that Church. She had till then been a Protestant, as had been also her first husband, Henry Grey; and the children of her first marriage had been baptised into the Church of Ireland.

Affidavits were filed as cause on behalf of the respondents, Mr. Scott and Miss Bailey, referring to these facts, and stating that the infants were being educated at the orphanage, and that the eldest had already formed decided religious convictions; that in the respondents' belief the present application was made for the sole purpose of changing the faith of the infants from that of their father into that of the applicant's present husband; and that if the infants lived with their mother it would be impossible for her to have them brought up in the Protestant religion. It was stated that she took her three sons to the Roman Catholic chapel, and was being assisted by the parish priest in maintaining and educating them. It was further deposed by paternal relatives of the infants that the infants' father was a very devout and strict member of the Church of Ireland, and would never during his life under any circumstances whatever have allowed his children to be brought up other than Protestants, and that, had he foreseen his widow's change of religion, he would have endeavoured, so far as in his power lay, to safeguard his

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children from any attempt to change their faith. It was further alleged that Christopher Callan's farm was only some 14 acres in extent, insufficient to support the infants in addition to the eight persons already residing thereon. The applicant in an affidavit in reply alleged that the deceased had only been to church thrice in thirteen years. Affidavits were subsequently put upon the file, as further cause, suggesting the unfitness of both Christopher Callan and the applicant; but with these affidavits, having regard to the view taken by the Court, it is unnecessary for the purposes of this report to deal. Notice had also been served that respondents would apply to have the mother removed from the guardianship of the infants.

T. M. Healy, K.C., and *T. Sullivan*, for the applicant.

Serjeant Dodd, K.C., and *Leech*, for the respondents.

Wakely, K.C., for some paternal relatives.

Cur. adv. vult.

May 16.

LORD O'BRIEN, L.C.J.:—

This is an important and in more than one respect a painful case.

The applicant, Mrs. Callan, has applied to the Court for a writ of *habeas corpus* to compel the Committee of the Protestant Female Orphanage at Harold's Cross to give back to her three children, her daughters, whom she placed in that orphanage. I desire at the outset to make it clear that I dismiss from our consideration the imputation which has been made upon Mrs. Callan's character for sobriety. No moral unfitness to warrant the Court to refuse her the custody of her children has been established against her, nor has any moral unfitness to receive the custody of the children been established against her present husband, Christopher Callan. The net question which remains is, in this or any other country, of supreme importance. It is this: Can a mother, who had three children by a husband who was a Protestant, and who, after his death, whilst she herself was a Protestant, placed them in a Protestant orphanage where they are well cared, now that she has, on a second marriage, become a Catholic, insist on these children, all of whom are of tender years, being restored to her by writ of *habeas*

corpus, when the Court to which she applies for that writ is satisfied that she intends to bring them up in a faith different from that in which their father lived and died? This is the question we have to decide. Let me put it in another way, Assume that both father and mother were Catholics, and that, on the death of the father, the mother, while yet a Catholic, placed the children in a Catholic orphanage, where they were well cared, and that on a second marriage she became a Protestant, and applied to the orphanage for the children, and on refusal by the orphanage to part with the children without the order of the Court, applied to this Court for a writ of *habeas corpus* to compel the Catholic orphanage to deliver the children to her—what order under these circumstances should the Court make, if it was satisfied that the mother intended to bring up the children in a faith different from that in which their Catholic father had lived and died? The question would be identical with the one before us, the word "Catholic" being substituted for the word "Protestant," and the word "Protestant" for the word "Catholic," but in its essence the legal question would be the same. Varying the factors which give rise to the question, while the question itself remains the same, serves to illustrate its supreme importance. What then is the answer to the question? The law, whose ministers we are, makes no hesitation: it adopts for the children the religion of the father, and requires that they be safeguarded in that religion. "*Religio sequitur patrem*" (1) may not be correctly described as an ancient maxim of the law, but certainly it correctly embodies a well-settled principle of the Court.

Thus in *Hawksworth* v. *Hawksworth* (2) Lord Justice James says:—

> "The rule of the Court is, that the Court, or any persons who have the guardianship of a child after the father's death, should have sacred regard to the religion of the father in dealing with the child, and, unless under very special circumstances, should see that the child is brought up in the religious faith of the father, whatever that religious faith may have been."

This is very explicit, "*sacred regard must be had to the religion of the father.*"

(1) [1902] 2 Ch. 688. (2) L. R. 6 Ch. 539, at p. 542.

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Again, in his judgment in *Re Agar Ellis* (1), Lord Justice James says:—

> "No doubt, the law may take away from him" [that is the father] "this right, or may interfere with his exercise of it, just as it may take away his life or his property, or interfere with his liberty; but it must be for some sufficient cause known to the law. He may have forfeited such parental right by moral misconduct, or by the profession of immoral or irreligious opinions deemed to unfit him to have the charge of any child at all; or he may have abdicated such right by a course of conduct which would make a resumption of his authority capricious and cruel towards the children."

This is the language of one of the most eminent Judges of recent times, Lord Justice James. There is nothing whatever in the case before us to justify a supposition that the father of these children had in any way abdicated or forfeited his right to have them brought up in the faith which he himself professed; and, the father not having abdicated or forfeited that right, we must regard the case precisely in the same way as if the father had expressly directed his children to be brought up in his own religious faith.

A recent case reported in the current (May) number of the English Reports under the title of *F.* v. *F.* (2), illustrates how strictly the principle "*religio sequitur patrem*" is enforced. The facts in that case were as follows:—A testator who died in 1896 by his will appointed his sister guardian of his infant daughter, then aged eleven. The testator was a Protestant, and the infant was brought up in that faith. In 1900 the sister, from conscientious motives, became a Roman Catholic; and, though she undertook not to interfere with the religion of the ward, and to provide a Protestant governess for her, yet it was held that she should be removed from her guardianship. Mr. Justice Farwell, in giving judgment, said:—

> "The principles on which the Court acts in cases of this description are well settled. The father's religion is *prima facie* the infant's religion—*religio sequitur patrem*—and the guardian's duty is to see that the ward is brought up in that religion, and is protected against disturbing influences by persons holding the tenets of a different faith: *In re Newbery* (L. R. 1 Ch. 263); *In re Besant* (11 Ch. D. 508, 519)."

(1) 10 Ch. D. 49, at p. 72.

(2) [1902] 1 Ch. 688.

Now, the mother's rights do not certainly stand higher than those of a guardian expressly so appointed by the will of the father. Later in his judgment the learned Judge said :—

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"One of the first and most sacred duties of the parents is to imbue the mind of the child with some religious belief, and this is done, not merely by precept and instruction, but by the unconscious influence of every-day life and conduct. The child is entitled to this care, and to the opportunity of resorting to the guardian for assistance and instruction in the doubts and difficulties that assail the youthful mind, and that usually become more marked and urgent as she develops from girlhood to womanhood. But if the guardian changes her religion, she deprives the ward of this protection and refuge. . . . I accept the guardian's assurance that she has not attempted, and will not attempt, in any way to influence the ward; but this means that the subject of religion is excluded from their conversation, and that the ward is deprived of all the protection and assistance on religious matters which she is entitled to expect from her guardian."

This is the language of Mr. Justice Farwell, and his language shows how strictly, as I have said, the principle, "*religio sequitur patrem*," is enforced.

It has been argued that the children should at the present moment be handed over to the mother—that this is an application for the common law writ of *habeas corpus* to give effect to the mother's rights under the Guardianship of Infants Act, 1886. The answer to that argument is to be found in two facts. First, that it has been decided (see *In re Scanlan* (1)) that the rule—that the father in his lifetime has the absolute right to decide what religious education his children shall receive, and that after his death the guardians of his children are bound to see that they are brought up in the religious faith of their father—is unaffected by the Guardianship of Infants Act. Secondly, that on applications for a writ of *habeas corpus* of the nature sought for here, the rules of equity as to the custody, education, and religion of children must prevail. Mr. Justice (now Lord Justice) Stirling was very clear about this in his judgment in *In re Scanlan* (1) :—

"The strength" (said the learned Judge) "of the rule of Courts of Equity, imposing on a surviving mother the obligation to educate her children in accordance with the religion of their father, clearly appears

(1) 40 Ch. D. 200, at p. 212.

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not only from the case to which I have just referred, but from the cases of *Austin* v. *Austin* (4 D. J. & S. 716), where the father died intestate and the mother was consequently guardian by nurture, and in *In re Newbery* (L. R. 1 Ch. 263), where the mother had (along with another) been appointed testamentary guardian. All conflict between the rules of law and equity on the subject ceased upon the coming into operation of the Judicature Act, 1873, sect. 25, sub-sect. 10, which provides that in questions relating to the custody and education of infants the rules of equity shall prevail."

It will be perceived that the basis, the determining feature of our judgment is that the children, if handed over to the mother, would be brought up in a faith different from that in which their father lived and died. That this would be so here, no candid mind can entertain any doubt.

It is charged both by letter and affidavit that the mother intends, if the children are handed over to her, to bring them up Catholics. To the credit of her veracity it is not suggested by her that she does not intend to do so. It is quite obvious that she would bring the children up Catholics if handed over to her. The brothers who are with her are being brought up Catholics. She herself has become a Catholic, and her second husband is a Catholic.

In *Houston's Case* (1), which went from this Court to the Court of Appeal, the principle of decision was that the children should not be given back to the mother, because the father's wishes to have them brought up in his own religion would not be effectual. The mother in that case consented that a Presbyterian guardian should be appointed to act with her, but the Court of Appeal very naturally held that effect could not be given to that suggestion. No such futile suggestion is made here. The paternal grandfather of the children and all their Protestant relations wish them to remain in the orphanage. It is not suggested that they are not well cared there and conscientiously instructed in the religion of their father. It is very painful indeed to be obliged to say to a mother that we are not now—whatever time may develop—in a position to grant her the custody af her children. Sitting here, we are, as I have said, but the ministers of the law, and we must obey its behests.

(1) C. A., 19 April, 1900.

ANDREWS, J. :—

In applications for the custody of children whose father is dead, and whose mother has survived him, the general principles are well settled that the Court must have careful regard to the welfare of the children, and that the religion of the father is that in which the children are to be brought up. Special circumstances may require additional consideration in particular cases, and what the Court has done in any particular case does not necessarily govern what it ought to do in every other case. Regard must always be had to the particular circumstances of the particular case in which the application is made.

In the present case the Court is bound to safeguard as far as it can the settled rule that, except under special circumstances (none of which appear to exist in this case), the children are to be brought up in their father's religion, and it is quite obvious that if they are transferred to the custody of their mother they will not be so brought up, but will be brought up in the different religion which, after their father's death and her second marriage, she has embraced. The circumstances of the present case are such that no effective or workable arrangement appears to me to be capable of being made which would prevent this being done if their mother obtains their custody. The Court can have no judicial preference for the present religion of the mother over that of the father, so as to regard the welfare of the children being in any way prejudiced by bringing them up, as they have hitherto been brought up, in their father's religion; and if, as has been stated and as is not improbable, the eldest girl, now fifteen years old, has acquired distinctive convictions in her father's religion, it might prove injurious to her welfare (which is to be considered in its widest sense) to have those convictions exposed to interference now.

The institution in which the children at present are was selected and approved of by their mother when she placed them there in or about July, 1900. It is stated in their aunt's affidavit, sworn on the 24th of April, that they are being well cared for and brought up there, and this is not questioned either by their mother or any other person. There is nothing to show that they would be better provided for at their step-

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father's small farm, where they probably would not have the same educational advantages; and I think there is reason to believe that, in other respects, they could not be as well provided for there. Having regard to all the circumstances of the case, the conclusion I have come to is, that the considerations in favour of leaving the children where they are at present are not outweighed by such advantages as would attend their residence with their mother, and any disadvantage which may arise from their being brought up, as they ought to be, in their father's religion, having regard to its differing as it does from that of their mother and step-father. The result in my opinion is, that having regard to the settled general principles by which the Court is guided in these applications and to the particular circumstances of this case, the present custody of these children ought not to be changed, and therefore that the cause shown should be allowed, and the conditional order discharged.

With reference to the motion to remove the mother from the guardianship of these children and appoint another guardian, I do not think it necessary to say more than that, in my opinion, this motion ought to be refused.

GIBSON, J.:—

The case is so important that I must shortly state my reasons for concurring. I pay no attention to the imputations of intemperance made on each side. I deal with the case as one where a respectable woman, the mother of six children by her first husband, has become the wife of a small farmer with a grown-up family, and having on her marriage joined her new husband's Church, and bringing up her three infant sons in the same creed, now seeks to take her three girls, aged 15, 7, and 4, from a charitable institution of her own choosing, where they are apparently well cared and where the paternal relatives wish them to remain, such relations intending to provide for their support if necessary. From the humble position of the parties and the history of the case, the certain and intended consequence of the custody of the children being given to the mother must be that the religion in which they were born, baptised, and bred will be changed. It cannot be safeguarded. No undertaking

has been suggested on the part of the mother as to bringing up the children in their father's faith, nor, having regard to the facts, could any such undertaking if given be relied upon.

The jurisdiction in *habeas corpus* must now be exercised in accordance with the principles on which Courts of Equity act. Our decision depends on two questions. What is the rule of law as to children's religion; and does that rule require the Court, in such circumstances as those before the Court, to refuse to transfer the custody to the mother?

If the Court had now to decide for the first time, I would think there was much force in the observations of Wickens, V.-C., in *Hawksworth* v. *Hawksworth* (1); but the law is settled that *prima facie* children follow the creed which the father who begot them professed. Judges cannot search the secrets of the heart or base their decision on the supposed intensity of the father's convictions. They have no spirit gauge, and must go by appearances. Many whose personal religion is lukewarm have a fervour of antipathy to other creeds. In the absence of evidence the other way the Court attributes to the parent the wish that his offspring should be brought up in the Church of which he was a professing and ostensible member: *Re North* (2); *Re M'Grath* (3).

The Court must give effect to this wish, save under exceptional circumstances, as, for instance, where the child has formed serious religious convictions which it would be dangerous to attempt to disturb, or where the parent has abandoned his right to direct his child's religion, or the child has been transplanted to another home and surroundings where it would be best for its happiness, prosperity, and welfare that it should remain. I do not attempt a definition of the conditions which may justify the Court in allowing the paternal faith to be disregarded—there may possibly be considerations of danger to life or health which would call for a relaxation of the rule.

But mere material advantage is not enough; religious faith is not to be made the subject of barter: *Andrews* v. *Salt* (4); *Re Nevin* (5), *per* Lord Justice Bowen; *Talbot* v. *Earl of Shrews-*

(1) L. R. 6 Ch. 539, at p. 540.
(2) 11 Jur. 7.
(3) [1893] 1 Ch. 143.
(4) L. R. 8 Ch. 622, at p. 638.
(5) [1891] 2 Ch. 299, at p. 313.

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bury (1). I am not aware of any case where on the mere balance of temporal benefit the Court has ever sanctioned the abandonment by infants of a father's religion where the father has done nothing to forfeit his rights.

So far as worldly prospects are concerned the scale is nearly in equilibrium. Being without means, the girls must earn their own livelihood. Trained and prepared in the institution, they are just as likely to be useful members of the community as if they became resident under their stepfather's roof. He has a family of his own already who have the first claim on his bounty; the girls would be entirely dependent on him; should they remain in their father's creed their existence would be spent in a deleterious atmosphere of controversy and discomfort.

The weight of the main arguments in support of the application—mother's love, the sacredness of home, family union, the danger of domestic ties being permanently sundered, and the mother's rights as guardian by nature and statute together—I recognise. But how, consistently with the rule that the children are to follow the father's faith, and in a state of society where particular standards of dogmatic religion are believed by many to be essential to salvation, can the Court grant the application of one who intends to violate the rule? We are asked to exercise jurisdiction not *against* but *in favour of* a mother who has committed a breach of marital trust in the case of her dead husband's three boys. There is no example of the Court making such an order. Her position as guardian does not, as has been more than once decided, affect the application of the rule.

The tender age of two of the children has made me hesitate. But the age in *Houston's Case* (2) was seven years; it is best that the girls should be brought up together; it is not suggested that the institution is not well managed or that the girls are not well cared and taught; and the eldest is alleged to entertain definite religious convictions.

A painful alternative is imposed on the Court: either, by acceding to the application, practically to sanction the children's renunciation of their father's faith, or by refusing it, to divide the

(1) 4 M. & Cr. 672. (2) C. A., 19 April, 1900.

family and home. In my opinion *Houston's Case* (1) is a direct authority against the application. The conclusion of the Court of Appeal in that case is supported by the opinion of Sir George Turner: *In re Newbery* (2). The difficulty has arisen from the voluntary though no doubt conscientious action of the mother.

In every country where sectarian divisions exist it is essential that there should be a settled and intelligible rule as to the religion of the offspring of wedlock; and, whether the rule be in the abstract right or wrong, it is better that there should be some rule than none at all. The decision of each case ought not to depend on the varying impulse of uncontrolled judicial discretion. As the rule exists it should be, in the absence of such exceptional circumstances as I have indicated, steadily and unswervingly applied. To-day it is a Protestant father whose rights are in question; to-morrow it may be a Roman Catholic. A lay tribunal does not and cannot distinguish and adjudge between the claims of the various Churches as teachers of divine truth; it cannot affirm that an infant's welfare is bound up with any particular form of creed; but if it has an objective rule—the male parent's professed religion—it can decide securely and without appearance of bias.

Solicitor for the applicant: *J. Brady.*
Solicitors for the respondents: *Webb, Scott, & Seymour.*

A. E. R. J.

(1) C. A., 19 April, 1900. (2) L. R. 1 Ch. 263, at p. 267.

H. L.
1899.

June 19.

EARL OF GOSFORD, APPELLANT; IRISH LAND COMMISSION, RESPONDENTS.

Appeal—House of Lords—Appellate Jurisdiction Act, 1876 (39 & 40 *Vict. c.* 59), *ss.* 3, 12—*Judicature Act* (*Ireland*), 1877 (40 & 41 *Vict. c.* 57), *s.* 86.

APPEAL from the orders of the Queen's Bench Division (32 Ir. L. T. R. 27), and of the Court of Appeal ([1899] 2 I. R. 399). The Irish Land Commission petitioned to dismiss the appeal as incompetent.

The Right Hon. The Mac Dermot, Q.C., for the respondents.

Ronan, Q.C., for the appellant.

THE HOUSE OF LORDS (Earl of Halsbury, L.C., and Lords Macnaghten, Morris, and Shand) held that no appeal lay (1).

Solicitors for the appellant: *Boxall and Boxall*, for *Monroe and Anderson.*

Solicitors for the respondents: *Nicholl, Maxisty and Company*, for *W. Alexander.*

(1) [1899] A. C. 435.

THE QUEEN (AT THE PROSECUTION OF THE COUNTY COUNCIL OF KILDARE), APPELLANT; BARTON AND GREAT SOUTHERN AND WESTERN RAILWAY COMPANY, RESPONDENTS. *H. L.* 1902. May 1.

Appeal—House of Lords—Certiorari—39 & 40 *Vict. c.* 59, *ss.* 3, 12—*Judicature Act* (*Ireland*), 1877, *s.* 86.

APPEAL by the County Council of Kildare from the judgment of the Court of Appeal, [1901] 2 I. R. 215. The respondent Company objected to the competency of the appeal.

Ronan, K.C., and *D. G. Chaytor*, for the Company.

The Solicitor-General for Ireland (*Campbell, K.C.*), and *Vesey Fitz Gerald*, for the Commissioner of Valuation.

Balfour Browne, K.C., of the English Bar (*Falconer, K.C.*, and *Sylvain Mayer*, of the English Bar, with him), for the appellants.

THE HOUSE OF LORDS (Earl of Halsbury, L.C., and Lords Shand, Davey, Brampton, and Robertson) held that the appeal was incompetent (1).

Solicitors for the appellants: *Francis and Johnson*, for *W. Grove White.*

Solicitors for the respondents: *Young, Jackson, Beard, and King*, for *Barrington & Son* and *Sir P. Coll.*

(1) [1902] A. C. 268.

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ADMINISTRATION—*continued.*
years afterwards, without having administered the estate. The other children desired to have the farm sold, and the assets distributed. The address of the administrator in Australia was not known. The Court, upon the application of the children, revoked the grant, and made the usual order for administration *de bonis non* to one of them. *Goods of Loveday* ([1900] P. 154) followed. *In the Goods of Colclough* - K. B. (PROB.) 499

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2. —— *House of Lords*—Certiorari—39 *&* 40 *Vict c.* 59, *ss.* 3, 12—*Judicature Act* (*Ireland*), 1877, *s.* 86.] Appeal from the judgment of the Court of Appeal ([1901] 2 I. R. 215):—*Held*, incompetent. *Reg.* (*County Council of Kildare*), *Appellant*; *Barton and G. S. and W. Railway Co., Respondents* - - - - - - H. L. 697

3. —— *Quarter Sessions—Summary jurisdiction —Practice—Public Health* (*Ireland*) *Act*, 1878) 41 *&* 42 *Vict. c.* 52), *sect.* 269.] In appeals to Quarter Sessions under the Public Health Act, 1878, a code of procedure, complete in itself, is provided by section 269, and notice of appeal need not be served on the individual Justices who adjudicate at Petty Sessions. *Reg.* (*Lyster*) v. *Justices of Queen's Co.* ([1901] 2 Ir. R. 132, n.) followed. *Rex.* (*Commissioners of Public Works*) v. *Chairman and Justices of County Down* K. B. 220

APPORTIONMENT—*Landlord and tenant—Rent—Assignment by tenant during currency of gale—Apportionment Act*, 1870 (33 & 34 *Vict. c.* 35).] *P.* took an assignment, by way of mortgage, from *O'N.*, of lands held by *O'N.* as tenant to *G.*, during the currency of a half-yearly gale of rent. *G.* claimed to be entitled to recover from *P.* the full amount of the half-year's rent falling due upon the next gale-day after the assignment:—*Held* (Kenny, J., *dissentiente*), the Apportionment Act, 1870, applies to the liability to pay as well as the right to receive, and that *G.* was entitled to recover from *P.* only an apportioned part of the rent, computed *de die in diem* from the date of the assignment to the gale-day. *Glass* v. *Patterson* - - - - - - - K. B. 660

2. —— *Landlord and tenant—Rent—Bankruptcy—Proof of debt—Disclaimer by assignees.*] Upon the disclaimer by the assignees of a bankrupt of his interest in a lease, the lessor is entitled to prove in the bankruptcy for an apportioned part of the rent which has accrued due between the last gale-day and the date of adjudication. *In re Leeks* [App. 339

—— County Council and Urban District Council —County charges - - 485, 495

See Contribution. 1, 2.

ARRANGING DEBTOR—*Preferential payment — Contract — Illegality — Consideration — Forbearance to enforce claims under illegal contract—Bankruptcy Amendment Ireland Act*, 1872 (35 & 36 *Vict. c.* 58), *sect.* 76.] On the 14th October, 1879, by a deed executed between O'Neill (an arranging debtor), and *F.*, one of his creditors, reciting that O'Neill was compounding with his creditors, and that *F.* had agreed to become surety on O'Neill's promissory notes for the payment of the composition, and reciting that the condition of *F.*, so becoming surety was that O'Neill should assign all his property to *F.*, to secure him against loss as such surety, O'Neill thereby, "for the consideration aforesaid," undertook to pay *F's* debt (£215) in full, and that *F.* should hold the property to be so assigned to him as security for that debt. The parties were advised of the illegality of this transaction, but in April, 1880, by a deed, reciting the composition arrangement and the deed of 1879, O'Neill, "for the consederations as aforesaid," mortgaged his shop and premises to *F.*, to secure the repayment of (*a*) any sums paid by *F.* on foot of the composition notes, (*b*) the debt of £215 in full, with interest, and (*c*) all further sums payable by O'Neill to *F* for goods to be supplied. O'Neill disappeared in 1882, leaving a balance of some £400 due to *F.* under this deed. In 1893 F. obtained from O'Neill's wife (the defendant), who had continued to carry on his business, promissory notes for £185 to secure the balance then remaining due on foot of the mortgage of 1880. This balance was made up of the £215, of moneys paid by *F.* to meet certain of the composition notes, and of moneys due for goods supplied since 1880, less certain payments on account from time to time. In 1900 the indebtedness under these notes had been reduced to £104, and *F.* now sued the defendant (Mrs. O'Neill) for that sum:—*Held*, that the plaintiff must fail; that the deed of 1879, being an illegal agreement for the payment in full of *F.'s* debt, and the same consideration being the operative foundation for the entire of the mortgage of 1880, the latter deed was illegal and wholly unenforceable; and that the plaintiff's forbearance to enforce the mortgage of 1880 (of the illegality of which he had knowledge) could not constitute a good consideration to support the defendant's promise to pay what remained due on foot of that mortgage *Furnivall* v. *O'Neill* - K. B. 422

ARRANGING DEBTOR—*continued.*

ARREARS OF RENT ACT, 1882—*Termination of tenant's interest—Eviction for non-payment of rent—Successor in title of landlord—Liability of landlord to pay.*] In and prior to 1882 the lands of Kilbride, in the county of Wicklow, were vested in trustees, upon trust for Mrs. *M.* for life, with remainder as she should appoint. One of the trustees was *J. S. M.*, the husband of Mrs. *M.* In 1883 *Q.*, a tenant on the estate, and *J. S. M.* obtained advances under the Arrears of Rent Act, and by charging orders, dated the 29th September, 1883, these two sums were charged on the lands, and made repayable by annual instalments for thirty-five years. *J. S. M.* and Mrs. *M.* died, and *J. F. M.*, their son, succeeded to the property under an appointment from Mrs. *M.* The tenant *Q.* died in 1896, and was succeeded in the tenancy by *L.*, who was ejected for non-payment of rent by *J. F. M.* in 1897. *J. F. M.* entered into possession of the holding, portion of which he let to *K.*, retaining the residue in his own hands. The tenant paid the instalments of the annuity under the Arrears Act down to the date of the eviction. The Land Commission sued *J. F. M.* for the instalments accrued since the eviction:—*Held* (by Lord Ashbourne, C., and Walker and Holmes, L.JJ., *diss.* Fitz Gibbon, L.J.), that *J. F. M.* was liable. *Irish Land Commission* v. *Moore* - - - - - - App. 27

BANKRUPTCY — *Annulment of — Offer by bankrupt to pay 20s. in the £1 and costs of bankruptcy—Interest—Interest-bearing debts—Irish Bankruptcy Act*, 1857 (20 & 21 *Vict. c.* 60), *s.* 304.] *S.* was adjudicated bankrupt on the 15th October, 1886, the amount of the debts proved being £1308, and the only assets consisted of the life interest of the bankrupt in a rentcharge of £200 payable out of lands in the county of Kilkenny, and also of a jointure of £100 a-year

BANKRUPTCY—*continued.*
charged on the same lands. These lands were subject to prior charges, and *M.*, one of the prior chargeants, brought an action in the Chancery Division to raise her charge. A Receiver was appointed in 1886, and from that date till 1893 all the profits of the lands were devoted to paying off *M's* charge. Since 1894 the surplus became available for payment of the creditors in bankruptcy. In September, 1899, 10*s.* in the £1 was paid; in January, 1900, a further dividend of 5*s.* was paid; and, in January, 1901, a dividend of 2*s.* 6*d.* There was no further money immediately available from the rents of the lands to make any payment. The bankrupt was sixty-four years old, and was not a good life, and the assignees had not, up to the date of the motion, taken any steps to sell the life interest in the lands. The bankrupt applied that, on payment by her of the sum of 20*s.* in the £1 and of the costs of the bankruptcy, the bankruptcy should be annulled:—*Held* (reversing the decision of Boyd, J.), that the bankruptcy should be annulled on the terms offered by the bankrupt. *In re Staunton* App. 57
—— Arranging debtor—Preferential payment—Contract—Illegality - - - 422
See Arranging Debtor.
—— of husband—Wife's settled real property—Loan to husband - - - 310
See Husband and Wife. 2.
—— of lessee—Disclaimer by assignees — Apportionment of rent - - - 339
See Apportionment. 2.

BYE-LAW—*Fisheries* (*Ireland*) *Acts — Steam Trawling* (*Ireland*) *Act*, 1889—52 & 53 *Vict. c.* 74 — Ultra vires — *Territorial waters.*] The Inspectors of Irish Fisheries, in pursuance of the Steam Trawling (Ireland) Act, 1889 (52 & 53 Vict. c. 74), s. 3, made a bye-law (duly approved of) prohibiting steam-trawling within an area, defined by them, which extended more than three miles seaward of low water-mark. The defendant was convicted under this bye-law for illegally fishing with an "otter-trawl" at a point some five miles distant from the coast:—*Held* (Gibson, J., *diss.*), that the bye-law was *intra vires*, and binding, at least, upon all subjects of the British Crown. *Quære*, Whether the bye-law in question was valid in the case of foreigners? *Rex* (*Coleman*) v. *Pettit* - - - - - - K. B. 1.

CANDIDATE — County Council — Libel—Injunction - - - - - - 207
See Libel.

CASES—*Bradford* v. *Dublin and Kingstown Railway Co.* (7 Ir.C.L.R. 57, 614) followed 63
See Landed Estates Court Conveyance.
—— *Dennehy* v. *Corrigan* (unreported) stated and followed - - - - - 63
See Landed Estates Court Conveyance.
CASES—*continued.*
—— *Loveday, In the Goods of* ([1900] P. 154) followed - - - - - - 499
See Administration.
—— *R.* (*Co. Dublin County Council*) v. *New Kilmainham District Council* ([1902] 2 I. R. 495) followed - - - - 485
See Contribution.
—— (*Lyster*) v. *Queen's Co.* (*Justices of*) ([1901] 2 I. R. 132*n*]) followed - - 220
See Appeal. 3.
—— *Roe* v. *Lidwell* (9 Ir. C. L. R. 184) followed 63
See Landed Estates Court Conveyance.

CERTIORARI — *Local Government — Existing officer—Increase of remuneration—Increase of duties —County surveyor — Assistant surveyor — Sealed order of Local Government Board—Judicial act—Jurisdiction of Local Government Board — Local Government* (*Ireland*) *Act*, 1898, *sect.* 115, *sub-sect.* 18.] Section 115, sub-section 18, of the Local Government (Ireland) Act, 1898, enacts that if any existing officer transferred to the County Council has his duties increased or diminished by reason of the Act, he shall be bound to perform those duties, and shall receive such increase or diminution of remuneration in proportion to the increase or diminution of his duties as the Local Government Board may determine. It appeared from the statements of the Local Government Board that in the case of two existing officers—a county surveyor and an assistant surveyor—the Board, in purporting to determine what their increase of remuneration was to be under this section, recast their old salaries, giving not merely increase of remuneration in respect of the increased duties, but fixing a scale of remuneration for all the officers' duties, old as well as new:—*Held*, that the determination of the Local Government Board was so far a judicial act, that it was not exempt from *certiorari*, and that, as their decision was based on a wrong principle, a writ of *certiorari* should issue for the purpose of quashing it. *Reg.* (*Wexford County Council*) v. *Local Government Board* (*Webster's Case*). *Same* v. *Same* (*Leary's Case*) - - - App. 349

2. —— *Local Government* (*Ireland*) *Act*, 1898—*Inchoate proceeding — Application of Enactments Order* (*22nd December*, 1898), *Article* 26, *Article* 36 (10), *Rules vi. and viii.—County council order dividing an urban district into wards.*] An order of a county council under the Application of Enactments Order of 22nd December, 1898, Article 26, dividing an urban district into wards, being an inchoate or provisional order merely, imposing no obligation until confirmed by the Local Government Board, cannot be made the subject of *certiorari*. *Rex* (*Jordan*) v. *Enniskillen Urban District Council and Fermanagh County Council* K. B. 452
—— Appeal to House of Lords - - 697
See Appeal. 2.

CITATION—Proceedings to prove will—Compromise - - - - - - 403
See COMPROMISE.

COMMISSIONER OF VALUATION.
See VALUATION ACTS.

COMMON INFORMER — Game laws—Prosecution - - - - - - 78
See TRESPASS IN PURSUIT OF GAME.

COMPENSATION—Workmen's Compensation Act, 1897—Unsuccessful claim under—Independent proceedings - 504, 518
See WORKMAN.

COMPROMISE — *Probate— Practice — Will— Proof in solemn form—Citation to see proceedings—* Res inter alios acta*—Cognizance of proceedings and power to intervene—Estoppel.*] A person, although cited to see proceedings, is not estopped by judgment therein as the result of a compromise, to which he was not a party, and of which he knew nothing; and he is not estopped from questioning the validity of a will proved in solemn form as the result of such verdict and compromise. *Ritchie* v. *Malcolm* - - - K. B. (PROB.) 403

COMPULSORY PURCHASE — Sanitary Authority — Labourers' cottages and allotments - - - - 222
See SANITARY AUTHORITY.

CONSIDERATION—Contract—Illegality 422
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CONSTRUCTION OF STATUTE—Code—56 & 57 Vict. c. 71, s. 14, sub-s. 1
See FOOD. 2. [585, 599

CONTEMPT — *Libel — Pending proceeding* — Where the trial of a prosecution for seditious libel had been held, but the jury had disagreed, and it was intended (though not formally stated) that a new jury would be empannelled:—*Held*, that the proceeding was still a "pending" one, and that it was a contempt of Court for a journal to criticise the proceeding. An application for alleged contempt of Court committed by an incorporated company should be by motion, not for attachment, but to attend and answer in respect of such contempt. *Rex* (*Attorney-General*) v. *Freeman's Journal* (*Limited*) *and Braydon, In re Rex* (*Attorney-General*) v. *M'Hugh. Same* v. *M'Sweeny* [K. B. 82

CONTRIBUTION—*Local Government* (*Ireland*) *Act*, 1898, *sections* 51, 59, *and* 66—*Apportionment of county charges—Action on foot of a demand note—Contribution between urban district council and county council—Dublin Corporation Acts—Dublin bridge tax—Metropolitan police tax—Right to deduct uncollected and irrecoverable balances in respect of apportioned bridge tax and police rate—Right to credit for 5 per cent. deduction for costs of collection, etc.*] The plaintiffs sued the defendants for the balance (£99) due on foot of their demand note of

CONTRIBUTION—*continued.*
the 5th October, 1899, for £16,170, for the services of the year ending 31st March, 1900. This balance (£99)—being 5 per cent. on the amounts apportioned on the defendants for bridge tax and police tax—the defendants disputed, on the ground (*a*) that they were entitled to deduct it for costs of collection, &c., under section 66, sub-sect. 4, of the Local Government Act, 1898, and (*b*) on the ground that it represented uncollected and irrecoverable rates for bridge and police taxes upon unoccupied premises:—*Held*, that section 51 imposed an unqualified duty on the defendants to pay the amount as set out in the demand note, and that the plaintiffs were therefore entitled to judgment for the full amount sued for, irrespective of the capacity of the defendant body to pay, or the power of the plaintiffs to make such judgment fruitful:—*Held* further, following *Reg.* (*Co. Dublin County Council*) v. *New Kilmainham Urban District Council* ([1902] 2 I. R. 495), that the defendants were not entitled to participate in the 5 per cent. deduction for costs of collection, &c., allowed by section 66, sub-section 4. *County Dublin County Council* v. *Pembroke Urban District Council* [K. B. 485

2. —— *Local Government* (*Ireland*) *Act*, 1898, *sects.* 51, 66—*Contribution between district council and county council—Time of payment—Deduction for costs of collection and irrecoverable rates—Local Government Board* (*County Councils*) *Order of* 18*th April*, 1899, *Article* 22.] Under sections 51 and 66 of the Local Government (Ireland) Act, 1898, the 5 per cent. deduction for cost of collection and irrecoverable rates must, in the accounts between the county council and its contributory district councils, be credited to the former. The Court will decline to enter upon the question of the legality of a demand note duly served in pursuance of the Local Government Board (County Councils) Order of the 18th April, 1899, or to discuss the validity of that Order, upon a motion to make absolute or discharge a conditional order for the issue of a writ of mandamus; and would require such a question, if raised, to be raised by plea upon the return to the writ of mandamus, or upon writ of *certiorari*. *Reg.* (*County Dublin County Council*) v. *New Kilmainham Urban District Council* [K. B. 495

COSTS—*Practice—Civil bill jurisdiction—Residence—County—Division—General Order LXV., Rule* 4.] The words in General Order LXV., Rule 4: "When the parties reside within the jurisdiction of the Civil Bill Court of the county in which the cause of action has arisen" have reference to the general jurisdiction of the Civil Bill Court in relation to the whole county and not to a division of the county. When the parties reside in different divisions of the same county or County

COSTS—*continued.*
Court Judge's jurisdiction in which the cause of action has arisen, the plaintiff must recover a sum not less than £20 to become entitled to costs in the action. *Finn* v. *Clifford* - - - K. B. 345

2. —— *Practice*—"*Recover*" *in the action* "*a sum less than* £20"—*General Order LXV., Rule* 4—*Common Law Procedure Act*, 1856, *sect.* 97.] In an action of contract to recover £23 1*s.* 6*d.* the defendant paid the plaintiff after action brought the sum of £5, and pleaded it in the statement of defence as payment on account of the sum claimed in the action. The jury, at the trial, found a verdict for the balance—£18 1*s.* 6*d.*—which the Judge certified in his certificate was exclusive of the £5 which had been so paid after action brought, and had been referred to as such in the pleadings. Judgment was entered for £18 1*s.* 6*d.*, with costs, and the contents of the Judge's certificate were set forth on the face of the judgment. The parties resided within the jurisdiction of the Civil Bill Court of the county in which the cause of action had arisen:—*Held*, that inasmuch as it sufficiently appeared on the files of the Court, from admission in the pleadings, from the Judge's certificate, and on the face of the judgment, that the £5 had been obtained by force of the action, the plaintiff had "recovered" not "less than £20" in the action within the meaning of sect. 97 of the Common Law Procedure Act, 1856, and of Order LXV., Rule 4, and was entitled to the costs of the action. *Quinn* v. *M'Kinlay* - - - - - K. B. 315

—— Drainage Board—Mandamus to levy rates 138
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—— Contribution—Demand note—Urban district council - - - - 485, 495
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—— Division of urban district into wards—Order - - - - - - 452
See Certiorari. 2.

—— Non-repair of highway—Immunity from liability - - - - - 538
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COUNTY COURT—Same civil bill jurisdiction—Parties resident in different divisions of the same county - - - 345
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DESCRIPTION — Inconsistency — Map and schedule - - - - - 63
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DESERTION—Of wife—Summary jurisdiction - - - - - 112
See Husband and Wife. 1.

DISCLAIMER—Assignees of bankrupt—Apportionment of rent - - - 339
See Apportionment. 2.

DISPENSARY—*Local Government Board—Dispensary district—Medical officer—Resignation—Effect of tendered resignation unaccepted—Effect of reappointment of same medical officer as* locum tenens—*Mandamus.*] Dr. J. Cullen, the medical officer of a dispensary district in the respondents' union, upon threat of removal by the Local Government Board, tendered his resignation to the guardians. The guardians did not definitely accept, or refuse to accept, his resignation, but shortly thereafter, by resolution, they appointed him as *locum tenens*, pending a report by a special committee into the matters alleged by the Local Government Board, "as otherwise the district would be left without a medical officer." The Local Government Board insisted that upon the tender of Dr. Cullen's resignation the office had become vacant, and as the guardians declined to make a new appointment, the Board now sought by mandamus to compel them to take the necessary steps to fill the vacancy:—*Held*, that the office did not become vacant upon the tender of the officer's resignation, but that (the tender remaining open) the subsequent appointment of Dr. Cullen as *locum tenens* involved in law an acceptance of his resignation, and that mandamus should issue. *Semble*: It is not competent to such district medical officer to resign his office without the assent of the guardians, his employers. The power of the Local Government Board to appoint a medical officer (14 & 15 Vict. c. 68, s. 8) on default of appointment by the guardians within a month, applies only where the previous officer has been removed by sealed order. *Reg.* (*Local Government Board*) v. *Guardians of North Dublin Union and Cullen* - - - Q. B. 412

DISQUALIFICATION—District Councillor
See District Councillor. [262

DISTRICT COUNCILLOR—*Local Government* (*Ireland*) *Act*, 1898 (61 & 62 *Vict. c.* 37)—*Local Government* (*Application of Enactments*) *Order of the 22nd December*, 1898, *Article* 12, *clauses* 4 (*c*) *and* 5 (*a*)—*Disqualification—Person* "*concerned in any bargain or contract*"—*Person* "*interested in the lease of any lands*"—*Labourer's*

DISTRICT COUNCILLOR—*continued.*

cottage.] The defendant was summoned and convicted at Petty Sessions for acting as a district councillor while disqualified, the ground of disqualification alleged and proved being that at the time of so acting he was in occupation of a labourer's cottage and allotment, under the Labourers (Ireland) Act, under monthly agreement of letting from the district council:—*Held*, on case stated, that such letting was not a "bargain or contract" within the meaning of the Local Government (Application of Enactments) Order, Article 12, clause 4 (*e*); that, even if it was such a bargain or contract, still it came within the exception of clause 5 (*a*) of the same Article as a lease of lands; and that the conviction was wrong. *Local Government Board* v. *Rivers* - K. B. 262

DRAINAGE BOARD—*Power to levy rates to pay damages and costs of a successful plaintiff in an action brought against the Board for negligence—Mandamus.*] Mandamus may issue against a drainage Board to compel such board to levy a rate to enable them to pay the amount of damages and costs awarded against them in an action for injuries sustained by reason of their negligence in the construction of their authorized works. *Reg.* (*Parker*) v. *Carrigrohane Drainage Board* [Q. B. 138

DRIVER — Tramcar — Scope of employment
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ELECTION—County Council—Libel — Injunction - - - - - - 207
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—— Offer to pay money after accident—Relation of master and servant - 154, 187
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—— Onus of proof - - - - 154, 187
See MASTER AND SERVANT. 2.

—— Witnesses—Expenses - - 431, 447
See TAXATION OF COSTS. 2.

EXISTING OFFICER—*Local Government (Ireland) Act*, 1898, *sect.* 115—*Scheme for poor-rate collection—Poor-rate collector—Alteration of area and duties—Remuneration—Compensation.*] Subsection 18 of section 115 of the Local Government (Ireland) Act, 1898, applies to the cases of county poor-rate collectors, and must be read together

EXISTING OFFICER—*continued.*

with sub-sections 11–15 and the other sub-sections of section 115. Mandamus issued to the Local Government Board to take into consideration the claim of a poor-rate collector to increased remuneration in respect of an admitted increase in his duties, by reason of alterations under the Local Government (Ireland) Act, 1898. *Rex* (*M'Kay*) v. *Local Government Board* - K. B. 330; APP. 637

—— County Surveyor—Increase of duties—Local Government Board—Judicial act 349
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FEE-FARM GRANT—Costs of approval and execution by grantor - - 397
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—— Trawling—Bye-law - - - - 1
See BYE-LAW.

FOOD — *Food and Drugs Acts*, 1875, 1899 (38 & 39 *Vict. c.* 13; 62 & 63 *Vict. c.* 51)—*—Summary jurisdiction—Right of local inspector to prosecute for penalties in his own name.*] Where, under section 2 of the Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), the Local Government Board, or Board of Agriculture, through their officer, procure samples of an article of food (*e.g.* margarine) for analysis, and communicate the certified result of the analysis, when made, to the secretary of the local authority, the secretary of the local authority may, without any special resolution, transmit such certificate to the inspector appointed under the Food and Drugs Act of 1875; and he without antededent authorization may proceed in his own name to prosecute for any penalties to which the vendor may be liable. *Connor* v. *Butler* - - - - - K. B. 569

2. —— *Sale of goods—Contract—Warranty—Sale for a particular purpose—Reliance on seller's skill or judgment—Reasonably fit for use—Latent defect—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *sect.* 14, *sub-sect.* 1—*Construction of Codifying Statute.*] The plaintiff sent her granddaughter, Miss *D.*, to the shop of the defendant, a fishmonger, for two crabs. Miss *D.* told *G.*, the defendant's manager, that the plaintiff wanted two nice fresh crabs for her tea. *G.* stated that he had no live crabs, but that he could give her boiled ones. *G.* went to the window and took up two crabs. Miss *D.* pointed to another crab, and asked if he did not think it better. *G.* took it up and felt it, and said it was by the weight one should judge and not by the size, and put it away. Miss *D.* asked were they nice and fresh, and *G.* replied that they were. Miss *D.* paid for the crabs, and took them away. The defendant *bona fide* believed the crabs to be fresh and fit for human food. The plaintiff and Miss *D.* ate portions of the crabs that evening, and they both became seriously ill. In an action for

FOOD—*continued.*
damages on an express warranty, and also on a warranty to be implied under the Sale of Goods Act, 1893, the jury found that it was made known to the defendant that the crabs were required for use as human food; that the plaintiff relied on the defendant's assistant to select fresh crabs, and reasonably fit for that purpose; that the crabs were goods which it was in the course of the defendant's business to supply; and that those were not fresh and reasonably fit for human food. They also found that the defendant did not expressly warrant the crabs, and found a verdict for the plaintiff for £150:—*Held*, by the King's Bench Division, that the warranty implied by the sub-sect. 1 of sect. 14 of the Sale of Goods Act, 1893, on a sale of goods is not confined to manufactured goods; that the purpose indicated for which the goods in the present case were required, viz. for consumption as human food, was a "particular purpose" within the meaning of the sub-section; and that the verdict in favour of the plaintiff should stand. The principle of construction of codifying statutes considered by Palles, C.B.:—*Held*, by the Court of Appeal (affirming the decision of the King's Bench Division), that the crabs were bought for a particular purpose, made known to the seller, within sect. 14, sub-sect. 1, of the Sale of Goods Act, 1893, so as to show that the buyer relied on the seller's skill and judgment, and that the defendant was liable for damages:—*Held*, by FitzGibbon, L.J., that the seller would have been equally liable on the evidence at common law, and under section 14, sub-section 2, of the Act. *Wallis* v. *Russell* - - K. B. 585; App. 599

FRAUDULENT PREFERENCE—Arrangement - - - - - - 422
See Arranging Debtor.

GAME—Trespass in pursuit of—Prosecution—Common informer - - - 78
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HIGHWAY—*Liability of local authority for non-repair of—Negligence—County Council—Local Government (Ireland) Act, 1898, sections 4 and 82.*] A county council, as the local road authority, is not liable at common law in an action for damages for injury caused by negligent omission on their part to repair a highway under their control; nor is such immunity altered by the provisions of the Local Government (Ir.) Act, 1898, sects. 4 and 82 of which imposed upon a county council new and additional obligations in respect of the maintenance and repairs of highways. *Harbinson* v. *County Council of County Armagh* - - K. B. 538

HOLDING—*Land Law (Ireland) Act, 1881, section 21—Fishery Act, 1842, section 19—Stake-net weirs forming part of holding.*] Two stake-net weirs were, under the Fishery Act, 1842 (5 & 6 Vict. c. 106), section 19, legally erected in the tidal waters of the river *S.* by the lessee in occupation of adjoining lands. The lands, apart from the weirs, were admittedly agricultural or pastoral in their character; but, upon the expiration of the lease, on the 26th September, 1899, the weirs were, and had been for many years, by far the more valuable portion of the holding. Ejectment proceedings having been instituted by the lessor upon the expiration of the lease, the lessee claimed to be entitled to continue in possession as tenant under the Land Law (Ireland) Act, 1881, sect. 21:—*Held*, that the right to erect the weirs under the section was given to the lessee as occupying tenant; that it only continued during such occupation; and that the lessor was entitled to resume possession of the entire holding, including the weirs. *Grant* v. *Lymbery* - - K. B. 97

HUSBAND AND WIFE—*Justices—Summary jurisdiction—Poor law—Husband "deserting or wilfully neglecting to support his wife"—Vagrancy (Ireland) Act, 1847 (10 & 11 Vict. c. 84), s. 2.*] Upon a complaint before Justices, under 10 & 12 Vict. c. 84, s. 2 (the Vagrancy, Ireland, Act, 1847), to commit a husband to prison for "deserting and wilfully neglecting to maintain" his wife:—*Held* (*diss.* Lord O'Brien, L. C. J.), that defendant was entitled to adduce evidence to prove the wife's adultery, and such adultery, if substantiated, would afford a good defence. The English cases on the words "wilfully refusing or neglecting to maintain" a wife, in sect. 3 of the Vagrancy Act, 1824 (5 Geo. 4, c. 83), discussed and followed. *Phillips* v. *Guardians South Dublin Union* - - Q. B. 112

2 —— *Married Woman's Property Act, 1882—45 & 46 Vict. c. 75, s. 3—Separate estate lent or entrusted to husband for the purpose of his business—Bankruptcy of husband—Assets of husband—Wife's right to a deferred dividend.*] A married woman lent to her husband for the purpose of his business as hotel-keeper certain furniture to which she was entitled as her separate property. On the husband's bankruptcy his assignees claimed the furniture as his assets:—*Held*, that the furniture was to be treated as assets of the husband. In section 3 of the Married Woman's Property Act, 1882, the words "other estate" are not to be read as meaning only property *ejusdem generis* with that indicated by the preceding words "any money." *In re Donaldson* - - - - App. 310

ILLEGALITY—Contract—Preferential payment - - - - - - 422
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INFANT—*Custody of—Guardianship of Infants Act, 1886—Rights of a mother, who, after her husband's death, has changed her religion, to the custody of the infant children of the marriage—Habeas corpus.*] *G.*, a Protestant, died intestate in

INFANT—*continued.*
1900. Upon his death his widow, being in impoverished circumstances, entrusted the three infant daughters of the marriage to a Protestant orphanage. In November, 1901, she remarried with *C.*, a Roman Catholic, and became a member of his Church. It was admitted that if handed over to her the three infants (aged fifteen, seven, and four years) would be educated as Catholics. *C's* means consisted only of a small farm of some 14 acres:—*Held*, that, under all the circumstances of the case, the mother's application on *habeas corpus* for a transfer to her of the custody of the infants must be refused. *In re Grey* K. B. 684

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JUSTICES—*Summary conviction—Obstruction—Claim of right—Jurisdiction ousted—Town Police Clauses Act*, 1847 (10 & 11 *Vict. c.* 89), *sect.* 28.] To a complaint before Justices at Petty Sessions under sect. 28 of the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89), for obstructing a public footway, it is a good defence that such footway was dedicated to the public, subject to the right of the defendant to commit the acts of obstruction complained of, and such a defence if raised *bona fide* ousts the jurisdiction of the Justices. The evidence, however, to establish such defence should be of a cogent character. *Reg.* (*Christie*) v. *Justices of Londonderry*; *Reg.* (*Ballantine*) v. *Same* K.B. 266

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LABOURER'S COTTAGE — Allotment — Compulsory purchase - - 222
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—— Occupation—Monthly letting—District Councillor—Disqualification - - 262
See DISTRICT COUNCILLOR.

LANDED ESTATES COURT CONVEYANCE—*Description of premises—Adequacy of—Schedule and map inconsistent—Rejection of later description* — Falsa demonstratio.] Where two adequate descriptions occur in a deed, each purporting to describe what the deed conveys, and these descriptions are, in fact, at variance with each other, the earlier description must prevail. An action was brought to recover possession of premises known as 22, 23, 24, and 25 *M.*-street, formerly *D.*-street, in the town of *C.* The plaintiff's title was under a Landed Estates Court conveyance, whereby "the premises situate in or near *D.*-street, in the town of *C.*, then in the occupation of *T. L.*, and more particularly described in the schedule thereunder written, and delineated on the annexed map," were, with others, conveyed in fee-simple, subject to the lease referred to in the schedule. The description in the schedule was—"*Tenants' names*, Representatives of *T. L.*; *description*, In front to *D.*-street 43 feet, and from front to rere 58 feet; *rent*, 9*s.* 3*d.*; *tenure*, lease for 199 years from March, 1700." The map merely showed a plot of ground coloured red, bounded partly by *D.*-street, and partly by a lane. It was proved that the premises 22, 23, 24, and 25 *M.*-street formed no part of the premises described in the body and schedule of the conveyance, and were held by the defendants under a different title:—*Held*, that the description in the body and schedule of the conveyance was an adequate description of what was intended to be conveyed, and that the additional description on the map was an erroneous description, and should be rejected. *Bradford* v. *Dublin and Kingstown Railway Co.* (7 Ir. C. L. R. 57, 614), *Roe* v. *Lidwell* (9 Ir. C. L. R. 184), and *Dennehy* v. *Corrigan* ([1902] 2 I. R. 63 *n* (2)) followed. *Kenny* v. *Labarte* - - - - ANDREWS, J. 63

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—— Rent—Payment of head rent by sub-tenant—Statute of Limitations - 196, 201
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LIBEL—*Injunction — Candidate for election in county borough—Rival candidate—Disqualification—Composition with creditors—Notice served on electors.*] The defendant, a candidate for election in a county borough, published a circular, which he gave to the electors, stating that the plaintiff, a rival candidate, was disqualified on the ground that he had made an arrangement with his creditors within five years. The plaintiff issued a writ for libel and an injunction, and upon the same day obtained an interlocutory injunction. It appeared that the plaintiff had, in 1899, executed a deed of arrangement with his creditors, which had not been registered, but that he had subsequently settled with his creditors, who had given to him receipts in full. The defendant moved to dissolve the injunction and to remit the action to the Recorder's Court. The Queen's Bench Division (Johnson and Boyd, JJ.), refused both motions. On appeal:—*Held*, that the injunction should be dissolved, but that the motion to remit should be refused. *Fitzgerald* v. *Clancy* - - - - APP. 207

—— Seditious—Pending proceedings—Contempt
See CONTEMPT. [82

LICENSING ACTS—*Publican's license—Application at Quarter Sessions—Justices equally divided—Mandamus—3 & 4 Wm. 4, c. 68, ss. 2, 4, 5.*] On an application to Quarter Sessions for a publican's license, which was opposed, the Justices, after hearing evidence on behalf of the applicant and of the objector, made an order reciting that the Justices were equally divided, and rejecting the application:—*Held*, that the order was bad, not only for not stating the grounds of the refusal of the application, but also because the Justices being equally divided had not adjudicated on the question before them, and that therefore a writ of mandamus should issue to the Justices to hear and determine the application. On a similar application the order purported to be made by the Justices was—"Bench equally divided. No rule." The applicant now sought for a writ of mandamus to the Justices to

LICENSING ACTS—*continued.*
hear and determine the application, and also for a writ of mandamus to the Clerk of the Peace to issue the certificate mentioned in sect. 5 of 3 & 4 Wm. c. 68:—*Held*, he was entitled to the former writ, but not to the latter. *Reg.* (*Crowley*) v. *Justices of West Cork*; *Reg.* (*M'Intyre*) v. *Justices of County Donegal* - - - K. B. 252

2. —— *Publican—Unfitness of applicant—Absence of objection—Justices acting on their own knowledge.*] An applicant for the renewal of a publican's license appeared at the annual licensing petty sessions in a drunken and riotous state, and had that same day, and before the same bench, pleaded guilty to several charges of drunkenness and disorderly conduct:—*Held*, that the Justices were at liberty to act (though no objection was raised) on their own knowledge of his character so derived, and to refuse the application. *Reg.* (*Shannon*) v. *Justices of County Carlow* - - - - K. B. 142

LIMITATIONS, STATUTE OF — *Landlord and tenant—Rent—Lessor, lessee, and sub-tenant—Payment of head rent voluntarily by sub-tenant—Non-payment of rent to immediate landlord for nineteen years by sub-tenant—23 & 24 Vict. c. 154, s. 21.*] In the year 1881 the plaintiff became entitled under a will to the rent of £10 reserved by a yearly tenancy, but never received any payment of the said rent. The yearly tenant, since the year 1881, had paid no rent to his immediate landlord in respect of the premises held by him under the yearly tenancy, but he had, since the year 1890, paid one moiety of the head rent reserved by an old lease, and payable by his immediate landlord in respect of the premises. These payments in respect of the head rent were made voluntarily. In the year 1900 the plaintiff sued the defendant for rent under the yearly tenancy:—*Held* (reversing the decision of the Queen's Bench Division), that the rent was statute barred, and was not kept alive by the payments made in respect of the head rent. *Grogan* v. *Regan* - - K. B. 196; APP. 201

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MASTER AND SERVANT—*Authority—Scope of Employment — Tramway — Passenger standing on the driver's platform—Consent of driver—Violation of rules.*] The plaintiff arrived at a railway station at the outskirts of the city of Londonderry about nine o'clock at night. The station was one mile from the town, with which it was connected by the defendants' tramway. It was raining heavily, and there was only one tram-car, which was crowded both inside and on the back platform. The plaintiff got on the driver's platform, and the driver made no objection to his doing so. The plaintiff stated that he had travelled on the driver's platform some six times before without objection, and had always paid his fare. This evidence was controverted. The servants of the Tramway Company had orders not to allow anyone on the front or back platform, and notices were placed inside the cars that it was forbidden for anyone to stand there. During the journey the tram-car ran off the line owing to the points being set wrong, and the plaintiff was thrown off and sustained severe injury. No one else in the tram-car was hurt. The jury found that the servants of the defendant Company had no authority from the Company to allow the plaintiff to stand on the driver's platform; that the plaintiff stood on such platform with the permission of the defendants' servants; that such permission was not with the consent of the Company, and was in violation of their rules; that the plaintiff was travelling on the platform as a passenger intending to pay his fare; that the notice alleged to be posted in the tram-car was not brought to the plaintiff's attention or seen by him; and that reasonable notice was not given to the public of the rule of the Company that passengers should not occupy the platform. They further found that the accident was caused by the defendants' negligence in the driving of the tram-car, and awarded the plaintiff £500 damages:—*Held*, by the King's Bench Division (Palles, C.B., and Johnson, J., *dubitante* Gibson, J.), that the inference should be drawn, from the course of the trial and the evidence, that it was within the scope of authority of the defendants' servants to take persons as passengers on the front platform, and that, on such inference, coupled with the findings, the

MASTER AND SERVANT—*continued.*

plaintiff was entitled to judgment for the damages found. *Held*, by the Court of Appeal (reversing the decision of the King's Bench Division), that the findings of the jury negatived any authority in the driver to permit the plaintiff to stand on the front platform, whether derived from course of service or scope of employment; that such permission was not an act of agency, but was a personal indulgence outside course of service or scope of employment; and that the defendant Company were not liable. *Byrne* v. *Londonderry Tramway Company* - - - K. B. 457; APP. 469

2. —— *Negligence of servant—Scope of employment—Evidence of existence of relationship—Admission—Offer to pay money after accident—Burden of proof—Course of trial.*] The plaintiff was knocked down and injured by a runaway pony attached to a trap, which had been driven by *M.*, but was left standing by him in the street when it took fright. The pony and trap were the property of *B.* The plaintiff brought an action against *M.* and *B.* for damages for injuries received by the negligence of the defendants or their servants. At the trial a witness for the plaintiff gave evidence of a statement made by *M.* after the accident, to the effect that he had been driving the pony and trap, and had left them standing in the street, when the pony was startled and ran away. He also proved that after the accident, and after the plaintiff had been brought to hospital, *M.* claimed the pony and trap and took them away. The plaintiff's daughter proved that *B.* had called on her after the accident, and said that he was very sorry that they were his pony and trap, and that if she took her father home he would pay all expenses. In cross-examination it appeared that this offer to pay the expenses was made after the plaintiff's daughter had said to *B.* that she believed he had lent *M.* the pony and trap, to which observation *B.* replied with the ejaculation, "Humph." Neither *B.* nor *M.* were produced at the trial. Counsel for the defendant *B.* asked the Judge for a direction in his favour, which was refused, and the Judge amongst other questions, asked the jury to find whether *M.* was acting as the servant of *B.* within the scope of his authority. The jury answered this question in the affirmative, and found £250 damages against the defendants. *B.* moved to have the verdict set aside and the judgment entered for him in the action, on which motion the King's Bench Division made no rule, the Court being equally divided, Lord O'Brien, L.C.J., and Barton, J., being of opinion that there was no evidence to support the finding of the jury that *M.* was the servant of *B.*, acting within the scope of his authority; Madden and Boyd, JJ., being of opinion that, having regard to the non-production of the defendants, and the

MASTER AND SERVANT—*continued.*
offer to pay expenses made by B., there was evidence to support the finding:—*Held*, by the Court of Appeal, that there was no evidence to support the finding; that no presumption of the relationship of master and servant arose from the fact of *M.* driving *B.'s* pony and trap; that the offer to pay expenses was made on the basis of *B.* having lent the pony and trap to *M.*, and could not be treated as an admission of liability on another hypothesis; that the evidence offered being at least equally consistent with a state of facts on which *B.* would not be liable, he was entitled to a nonsuit or a direction in his favour; and that the verdict and judgment entered thereon against him should be set aside. *Powell* v. *M'Glynn and Bradlaw* - - K. B. 154; APP. 187
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POOR LAW — *Poor-rate—Summary proceedings for recovery of — Justices — 6 & 7 Wm. 4, c. 116, s. 152—1 & 2 Vict. c. 56, s. 73.*] Notwithstanding the repeal of sect. 152 of 6 & 7 Wm. 4, c. 116, by the Local Government (Ireland) Act, 1898, poor-rate is still recoverable summarily before Justices at Petty Sessions. The complaint in such case should be preferred in the name of the collector. A complaint brought in the name of the county council *held* properly dismissed by the Justices. *County Council of Clare* v. *M'Inerney* K. B. 536
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PROBATE — *Practice—Document partly testamentary admitted to probate.*] Where a document, duly executed as a will, is partly testamentary and partly not testamentary, the Court has jurisdiction to admit the testamentary part of the document to probate. *Wolfe* v. *Wolfe* - K. B. (PROB.) 246
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SANITARY AUTHORITY—*Labourers (Ireland) Acts*, 1883-1896 — *Power to compulsorily acquire a second half-acre plot for the purpose of adding same to an existing cottage and half-acre allotment.*] Under section 16 of the Labourers (Ireland) Act, 1885 (48 & 49 Vict. c. 77), a sanitary authority which has already acquired a cottage and half-acre plot under the Labourers Acts, 1883-1896, has power to acquire by compulsory purchase an additional plot of ground to be added to that already acquired by them, provided that the limit of one statute acre imposed by the Labourers (Ireland) Act, 1892 (55 & 56 Vict. c. 7), be not exceeded. *Rex* (*Coddington*) v. *Local Government Board* - - - - - - K. B. 222
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See CERTIORARI. 1.
62 & 63 Vict. c. 51—Food and Drugs, s. 2 569
See FOOD. 1.
SUBLETTING—Payment of head-rent by subtenant—Statute of Limitations 196, 201
See LIMITATIONS, STATUTE OF.
TAXATION OF COSTS—*Fee-farm grant—Costs of approval and execution by grantor—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order*, 16*th April*, 1884, *Rule* 2 (*c*).] The solicitor of a grantor in a fee-farm grant made under the Renewable Leasehold Conversion Act is entitled to have his costs, in respect of the approval and execution of the grant, taxed as provided by
TAXATION OF COSTS—*continued.*
Rule 2 (*c*) and Schedule II. of the General Order of the 16th April, 1884, made in pursuance of the Solicitors' Remuneration Act, 1881, and is not limited to an approval fee of two guineas. *Lowry and Mullan* v. *Brooks* ANDREWS, J. 397
2. ——*Instructions for brief at trial—Refreshers—Model—Expert witnesses—Exceptional circumstances—Architect and surveyor—Builder and contractor—Medical witnesses—General Order LXV., Rule* 64 (11).] In an action against a Railway Company for personal injuries to the plaintiff, in which the plaintiff recovered £450, the Taxing Master allowed two doctors who were called as witnesses for the plaintiff £17 17*s.* each for attendance, being £5 5*s* a-day for each of three days the case was at hearing and £2 2*s.* for the day it appeared in the list but was not taken up, when the Court was adjourned upon the official announcement of the death of Her late Majesty Queen Victoria. These doctors were both on the staff of the Richmond Hospital, Dublin, where the plaintiff was under treatment. These allowances were objected to by the defendants as being in excess of the allowances provided by Order LXV., Rule 64 (11), and the Taxing Master was asked to state his reasons and the grounds why he held the case an exceptional one. He reported that he considered the case exceptional from the time it occupied and the adjournment of the Court. He further stated that the special ground for increasing the daily allowances was that both doctors examined the plaintiff before the trial; that similar examinations had been made on behalf of the defendants by eminent doctors; that there was a conflict of medical evidence which rendered lengthened attendance during the trial necessary; and that both the doctors were men of eminence and authority in their profession:—*Held*, by the Court of Appeal (affirming the decision of the King's Bench Division), that none of the grounds stated made the case exceptional, and that therefore the allowance mentioned in Order LXV., Rule 64 (11) could not be increased, that that sub-rule was made only to regulate the payments to be made for the daily attendance of witnesses, and that increased allowances to witnesses could only be given under Order LXV., Rule 22, or Order LXV., Rule 64 (10):—*Held* also, by the King's Bench Division, that an allowance of £22 6*s.* 8*d.* was not excessive for instructions for brief at the trial; that refreshers to counsel for the day on which the case appeared in the list but was not taken up, when the Court was adjourned upon Her late Majesty's death, should not be allowed; that the builder who had constructed the model of the scene of the accident did not come within the category of a professional witness, and should only be allowed for his attendance at the trial at the

TAXATION OF COSTS—*continued.*
rate prescribed for "esquires, bankers, merchants, and the like witnesses"; and that the plaintiff was not entitled to charge the defendants for the attendance of the doctor who had treated the plaintiff in the country, in respect of more than one of three occasions when the defendants had given notice that they required the plaintiff to be examined by their doctors in Dublin. *Nolan* v. *Great Northern Railway Company*
[K. B. 431; App. 447

TERRITORIAL WATERS—Bye-law—Trawling - - - - - - - 1
See Bye-law.

TOWN CLERK—List of premises requiring revised valuation - - - 275, 294
See Valuation Acts.

TRAMWAY—Passenger standing on driver's platform - - - - - 457, 469
See Master and Servant. 1.

TRAWLING—52 & 53 Vict. c. 74 - - 1
See Bye-law.

TRESPASS IN PURSUIT OF GAME—*Game laws—Prosecution by gamekeeper as common informer—27 Geo. 3, c. 35 (Ireland).*] A complaint for penalties for trespass in pursuit of game (27 Geo. 3, Ir., c. 35) lies at the suit of a common informer. *Rex (Connolly)* v *Justices of County Tyrone* - - - - - - - K. B. 78

ULTRA VIRES—Bye-law—Trawling - 1
See Bye-law.

UNFITNESS—Applicant for publican's license—Justices acting on their own knowledge
See Licensing Acts. 2. [142

UNIT OF VALUATION—Different premises held under different leases converted into one building - - - 275, 294
See Valuation Acts.

VALUATION ACTS—*Rateable premises—Different premises held under different leases converted into one building—Unit of valuation—Bulk valuation—Town clerk's list—Jurisdiction of Commissioner of Valuation.*] Prior to 1897 Switzer & Co. were the occupiers of certain premises in Grafton-street, Dublin, and also of other premises in Wicklow-street, Dublin, held under different leases, and from different lessors, and valued as nine separate tenements. These premises consisted of one large shop, the main front of which faced Grafton-street. Structurally there was communication from one portion of the premises to the other, and they all formed the shop. The premises were valued separately as nine separate tenements, in respect of which *S. & Co.* had the right to deduct the landlord's proportion of poor-rate and income tax. In 1897 *S. & Co.* purchased the lessee's interest of certain houses in Clarendon-street, which ran parallel to Grafton-street, at the rere of their existing premises.

VALUATION ACTS—*continued.*
These premises were held under separate leases at rents varying in amount, and each of the houses in Clarendon-street had previously been valued separately. *S. & Co.* pulled down the houses, and erected on the site a large building facing Clarendon-street. Access was opened from the Grafton-street premises to the new building, so as to form one whole concern. When the Clarendon-street premises had been erected the rate collector, in pursuance of sect. 4 of the Valuation Act, 1854, placed the Clarendon-street premises on the list requiring revision of valuation, and the said list was duly transmitted by the Town Clerk to the Commissioner of Valuation, who, thereupon, struck out the separate valuations of the premises, and placed one bulk valuation on the entire premises in Grafton-street, Wicklow-street, and Clarendon-street:—*Held* (1), that the Commissioner had no jurisdiction to make a valuation of any property other than that in the Town Clerk's list; and (2) that he must make a separate valuation of all the separate properties held under different tenancies. *Switzer & Co.* v. *Commissioner of Valuation*
[K. B. 275; App. 294

WARDS—Division of urban district - 452
See Certiorari. 2.

WARRANTY—Sale of food - 585, 599
See Food. 2.

WAY—Footpath—Obstruction—Claim of right
See Justices. [266

—— Highway—Non-repair - - - 538
See Highway.

WEIR—Forming part of holding - - 97
See Holding.

WIFE.
See Husband and Wife.

WILL—Document partly testamentary admitted to probate - - - 246
See Probate.

—— Probate—Compromise—Citation - 403
See Compromise.

WITNESSES—Payments to—Order LXV. Rr. 22, 64 - - - - - - 431
See Taxation of Costs. 2.

WORDS—"Concerned in any bargain or contract"—Local Government (Application of Enactments) Order, Art. 12, clause 4 (*e*)
See District Councillor. [262

—— "Lease of any lands"—Local Government (Application of Enactments) Order, Art. 12, clause 5 (*a*) - - - 262
See District Councillor.

—— "Recover"—G. O. LXV., R. 4 - 315
See Costs. 2.

—— "Within the jurisdiction of the Civil Bill Court"—G. O. LXV., R. 4 - 345
See Costs. 1.

WORKMAN—*Employer — Compensation — Unsuccessful proceedings under the Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37)—*Right to institute subsequent proceedings independently of the Act.*] When a workman has proceeded to have compensation for his injuries assessed under the Workmen's Compensation Act, 1897, and is defeated by reason of a ruling that his case does not come within the provisions of the Act, he is not thereby prevented from instituting subsequent proceedings independently of the Act, to enforce any previously existing remedy to which he may have been entitled (Boyd. J., *diss.*). In September, 1900, the plaintiff instituted proceedings in the Recorder's Court for compensation, under the Workmen's Compensation Act, for injuries sustained on the 4th August, 1900. On the 18th October, 1900, the Recorder dismissed the application on the ground that the plaintiff, not having been employed for at least two weeks, was not within the Workmen's Compensation Act on the authority of two decisions of the Court of Appeal in England. These decisions were overruled by the House of Lords on the 14th December, 1900. The plaintiff brought an action for damages for negligence in the Superior Courts with respect to the same injuries as were the subject of the proceedings in the Recorder's Court:—***Held***, by the King's Division (Boyd. J., *diss.*), that the proceedings in the Recorder's Court were no bar to the action in the Superior Court:—***Affirmed*** by the Court of Appeal (Fitz Gibbon and Walker, L.JJ.; *diss.* Holmes, L.J.). *Beckley* v. *Scott & Co.*
[K. B. 504; App. 518

THE END.